SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 445

LAKE TANKERS CORPORATION, PETITIONER,

vs.

LILLIAN M. HENN, ADMINISTRATRIX

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 1, 1957

—4142-6

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Adm. 183-206

PETITION OF LAKE TANKERS CORPORATION IN A CAUSE OF EXONERATION FROM OR LIMITATION OF LIABILITY, CIVIL AND MARITIME—Filed October 6, 1954

First: The petitioner is now and was at the times hereinafter mentioned a Delaware corporation having an office for the transaction of business at 21 West Street, New York, N. Y., within this District, and was owner of the tug EASTERN CITIES and the barge L.T.C. No. 38.

Second: The EASTERN CITIES is a steel tug of 146 gross tons and 98 net tons register, 81.1 feet long, 24 feet beam, built in 1943. The L.T.C. No. 38 is a steel tank barge 229.5 feet long and 42.8 feet beam, without motive power of her own. Petitioner used due diligence to make said vessels seaworthy and at the time of the loss hereinafter set forth, and at and prior to the commencement of the voyage upon which said loss occurred, they were tight, staunch, strong, fully manned, equipped and supplied, and in all respects seaworthy and fit for the services in which they were engaged.

Third: On July 9, 1954, the EASTERN CITIES sailed from Perth Amboy, New Jersey, on a voyage to Ogdensburg, New York, via the Hudson River, the New York State Barge Canal and Lake Ontario, having No. 38 in tow laden [fol. 2] with a cargo of kerosene in bulk. She was under command of a competent and experienced master and was fully manned by a crew of competent and experienced licensed officers and unlicensed personnel. About 12:50 a.m. July 10, 1954, the EASTERN CITIES was proceeding up the Hudson River about in mid-channel below Esopus Meadows Light. The weather was clear and dark, wind light, current ebb. She was securely fastened to No. 38 and was pushing No. 38 ahead of her. Both vessels were exhibiting regulation navigation lights. As the EASTERN CITIES approached the bend in the Hudson River marked by

Esopus Meadows Light the green side light of a vessel, which proved to be the yacht BLACK STONE, emerged from behind Esopus Meadows Light. This light was kept under observation and in a short time a red light and a white light also appeared. The EASTERN CITIES sounded a one-blast whistle signal and the BLACK STONE appeared to veer to her right partially shutting out her green light. Thereafter she appeared to veer to her left, reopening her green light fully, and the EASTERN CITIES immediately sounded several short blasts of her whistle and immediately put her engines full speed astern. The BLACK STONE continued on at undiminished speed without sounding any whistle signal and although the EASTERN CITIES brought herself and No. 38 practically to a stop the BLACK STONE collided with the bow of No. 38. The collision occurred about 12:50 a.m. July 10, 1954, about in mid-channel below Esopus Meadows Light. [fol. 3] The BLACK STONE overturned. Two men boarded No. 38 directly from the BLACK STONE and others on the BLACK STONE went into the water. One of these emerged in the space between the bow of the EASTERN CITIES and the stern of No. 38. He was quickly extricated and immediately thereafter the EASTERN CITIES cast off from No. 38, directed her to anchor, which she did, and turned about and proceeded down river, playing her searchlight on the water searching for other persons who might be in the water. Seven persons were picked up in the course of this search. One man was reported to be missing. The search for him was continued for a considerable time but without success and he was not found. The BLACK STONE, floating largely submerged, was taken in tow but soon sank and the EASTERN CITIES, with ten survivors on board, returned to Poughkeepsie and landed the ten survivors at the Day Line pier where they were met by ambulances. Thereafter the EASTERN CITIES continued her voyage and arrived at Ogdensburg, New York, on July 14, 1954, where the voyage ended.

Fourth: The aforesaid collision and loss of life and personal injuries and the loss of the BLACK STONE were not caused or contributed to by any fault, neglect, design or want of care on the part of petitioner, or the EASTERN CITIES or No. 38, or of anyone for whom petitioner may be responsible, but were due solely to the negligence of Clyde W.

Roan, and his yacht BLACK STONE, and possibly others whose identities are unknown to petitioner.

[fol. 4] Fifth: The aforesaid collision and loss on July 10, 1954, and the loss of life, damage and destruction resulting thereform or consequent thereupon, were occasioned and incurred without the privity or knowledge of petitioner or of the master of the EASTERN CITIES or of the superintendent or managing agent of petitioner or of any of them at or prior to the commencement of the voyage upon which the EASTERN CITIES was then engaged.

Sixth: As a result of the aforesaid occurrences, one passenger of the BLACK STONE is thought to have lost his life, others sustained personal injuries and the BLACK STONE became a total loss. At the present time petitioner does not know the actual total amount of the claims that are or may be made for loss of life, injuries, and other losses and damages that may have been sustained.

On or about July 19, 1954, an action was commenced in the Supreme Court of the State of New York, Ulster County, by Clyde W. Roan, Robert E. Cruz, John E. Strong and Charles A. Carlson against petitioner to recover damages alleged to have been sustained as a result of the collision aforesaid. Plaintiff Roan claims damages in the amount of $7,500 for the loss of the BLACK STONE and other personal property, and $25,000 damages for personal injuries; plaintiff Cruz claims $25,000 damages for personal injuries; plaintiff Strong claims $50,000 damages for personal injuries, and plaintiff Carlson claims $50,000 damages for personal injuries. The attorney for the plaintiffs is Michael Nardone, Esq., Highland, N. Y.

[fol. 5] On or about September 22, 1954, an action was commenced in the Supreme Court of the State of New York, Ulster County, by Lillian M. Henn, as administratrix of the estate of Robert C. Henn, against petitioner and Clyde Roan, to recover damages for the alleged death of Robert C. Henn, claimed in said complaint to have been caused by the collision aforesaid. In this action plaintiff claims damages in the amount of $500,000. Attorneys for the plaintiff are Rosen & Rosen, 11 Market Street, Poughkeepsie, New York.

Petitioner expects that other claims may be made and that other suits or actions may be commenced against it by

persons claiming to have sustained damages and injuries upon the aforesaid voyage.

Seventh: This petition is filed within six months after the date of the aforesaid loss and within six months after petitioner received the first written notice of claim from any claimant.

Eighth: The voyage upon which the EASTERN CITIES was engaged at the times herein mentioned terminated on July 14, 1954, at Ogdensburg, N.Y. Her value at such time and place did not exceed the sum of $110,000.

The pending freight on the voyage was $8542.21. Petitioner is informed and believes that the entire aggregate value of its interest in said tug EASTERN CITIES and her pending freight at the end of the voyage upon which the loss occurred does not exceed the sum of $118,542.21. Subject to an appraisal of its interest upon a reference, petitioner offers an interim stipulation for value in the sum of $118,542.21, said sum being not less than the aggregate [fol. 6] value of petitioner's interest in said tug and her pending freight at the termination of the voyage on which she was engaged at the time of the loss aforesaid.

Ninth: There are no demands, unsatisfied liens or claims of liens against the EASTERN CITIES, her engines, etc., or her pending freight, or any suits or actions pending thereon so far as is known to petitioner except as set forth above.

Tenth: Petitioner claims exemption from liability for the losses, damages, injuries and destruction occasioned or incurred by or resulting from the aforesaid collision and losses and for the claims for damages that have been or may hereafter be made, and petitioner alleges that it has valid defenses thereto on the facts and on the law. Petitioner further claims the benefit of the limitation of liability as provided in the Revised Statutes of the United States, and of the various statutes supplementary thereto and amendatory thereof, and to that end petitioner is ready and willing to give a stipulation for the payment into Court of the amount or value of its interest in said tug EASTERN CITIES and her pending freight and such additional interest as may be appropriate, whenever the same shall be ordered by the Court as provided by the aforesaid statutes and by General Rules 51 and 54 in Admiralty and by the rules and practices of this Honorable Court.

Eleventh: All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

[fol. 7] WHEREFORE petitioner prays:

1. That this Court cause due appraisement to be made of the amount or value of petitioner's interest in tug EASTERN CITIES and her pending freight at the end of the voyage above described.

2. That the Court make an order directing petitioner to file a stipulation to be approved by the Court for the payment into Court of the amount or value of petitioner's interest whenever the Court shall so order.

3. That the Court make an order directing the issuance of a monition to all persons claiming damages for any and all losses, damages, injuries or destruction done, occasioned, sustained or incurred by or resulting from the aforesaid collision, or in any way consequent thereupon, or during the voyage upon which the tug EASTERN CITIES was then engaged, citing them to appear as directed in said order and make due proof of their respective claims, and also to appear and answer the allegations of this petition, according to law and the practice of this Court, on or before a certain time to be fixed by the monition.

4. That the Court make an order directing that upon the giving of such stipulation as may be determined to be proper, or of an interim stipulation for the payment into Court of the amount of petitioner's interest, an injunction shall issue restraining the prosecution of any and all suits, actions and proceedings already begun to recover damages arising out of, occasioned by, or consequent upon the aforesaid accident as set forth in this petition or during the voyage upon which the tug EASTERN CITIES was then engaged and the commencement or prosecution hereafter of any suit, action or legal proceeding of any nature or description whatsoever, except in the present proceeding, against petitioner or its agents or representative or against tug EASTERN CITIES, her engines, etc., in respect of any claim or claims arising out of the aforesaid voyage and the aforesaid accident.

5. That the Court in this proceeding will adjudge that

the petitioner is not liable to any extent for any loss, damage, injury or destruction, or for any claim whatsoever in any way arising from or in consequence of the aforesaid voyage; or if petitioner shall be adjudged liable, then that such liability be limited to the amount or value of petitioner's interest in tug EASTERN CITIES and her pending freight, as aforesaid, at the end of the voyage on which she was engaged at the time of said accident, and that petitioner be discharged therefrom upon the surrender of such interest, and that the money surrendered, paid, or secured to be paid as aforesaid, be divided pro-rata according to the hereinabove mentioned statutes among such claimants as may duly prove their claims in accordance with the provisions of the order hereinabove prayed for, saving to all [fol. 8] parties any priorities to which they may be legally entitled, and that a decree may be entered discharging petitioner from all further liability.

6. That petitioner may have such other and further relief as the justice of the cause may require.

Burlingham, Hupper & Kennedy, Proctors for Petitioner

[fol. 9] *Duly sworn to by Edward K. Bachman, Jurat omitted in printing.*

[fol. 10] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Ad. 183-206

In the Matter of the Petition of LAKE TANKERS CORPORATION, for Exoneration from or Limitation of Liability.

ORDER FOR INTERIM STIPULATION—October 6, 1954

A petition for exoneration from or limitation of liability having been filed by Lake Tankers Corporation, and said petitioner having prayed for an appraisal of its interest in

tug EASTERN CITIES and her pending freight and for leave to file a stipulation for the amount of said appraised value, or an *interim* stipulation pending such appraisal by a Commissioner to be appointed by this Court; and it appearing from the affidavits of Robert B. Mitchell, Jr., Charles F. Kellers, and H. S. Woodman, all sworn to on the 30th day of September, 1954, heretofore filed herein that the aggregate value of petitioner's interest in tug EASTERN CITIES and her pending freight does not exceed the sum of $118,542.21.

Now, on motion of Burlingham, Hupper & Kennedy, proctors for petitioner, it is

Ordered that the petitioner file herein an *interim* stipulation for the value of its interest in said tug EASTERN CITIES and her pending freight in the sum of $118,542.21, with interest according to Supreme Court Admiralty Rule 51, and it is further

Ordered that any party may apply to have the amount of said stipulation increased or diminished, as the case may be, upon the filing of the report of a Commissioner appointed to appraise the amount or value of petitioner's interest in said vessel and her pending freight, or upon the ultimate determination by the Court of exceptions to the [fol. 11] Commissioner's said report.

S. At New York, N. Y., in said Southern District on October 6th, 1954.

Archie O. Dawson, U.S.D.J.

[fol. 12] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

INTERIM STIPULATION—Filed October 8, 1954

Whereas Lake Tankers Corporation has instituted a proceeding in this Court for limitation of liability, if any, in respect of a collision which occurred between barge L.T.C.

No. 38 in tow of tug EASTERN CITIES and the yacht BLACK STONE on July 10, 1954, the facts of which are more particularly set forth in the petition filed herein on October 5, 1954, or for any other matter arising during the course of the voyage upon which the tug EASTERN CITIES was engaged at the time of collision, in which petitioner prays, among other things, that the Court will cause due appraisement to be made of the amount or value of its interest in tug EASTERN CITIES and her pending freight upon a reference to be ordered herein and that a monition may issue to all persons claiming damages for any and all loss, damage, injury or destruction sustained, occasioned or incurred by or resulting from said collision or during the course of the voyage upon which the EASTERN CITIES was then engaged, citing them to appear before this Court and to make due proof of their respective claims and to answer the petition herein; and that an injunction issue restraining the prosecution of any and all actions, suits or proceedings already begun and the commencement or prosecution thereafter of any action or legal proceeding against petitioner's tug EASTERN CITIES [fol. 13] except under and in pursuance of the provisions of the monition to be issued herein; and

Whereas, petitioner wishes to prevent the further prosecution of any and all proceedings already instituted against it and against the EASTERN CITIES and her pending freight and the commencement or the prosecution hereafter of any and all suits, actions, or legal proceedings, of any nature or description whatsoever in any and all Courts and also wishes to provide an *interim* stipulation for value as security for claims pending the ascertainment by reference of the amount or value of the interest of the petitioner in tug EASTERN CITIES and her pending freight.

Now, therefore, in consideration of the premises The Federal Insurance Company, having an office and place of business at 90 John Street, Borough of Manhattan, City of New York, hereby undertakes in the sum of One Hundred eighteen thousand five hundred and forty-two dollars and twenty-one cents ($118,542.21), with interest thereon from October 1954, that petitioner will pay into the registry of the Court within ten (10) days after the entry of an order confirming the report of a Commissioner to be appointed

to appraise the amount or value of petitioner's interest in tug EASTERN CITIES and her pending freight, if any, the amount or value of such interest as thus ascertained or will file in this proceeding a bond or stipulation for value in the usual form with surety in such amount; and that pending payment into Court of such amount or the giving of a stipulation for value thereof, this stipulation shall stand as security for all claims in said limitation proceeding.

Said The Federal Insurance Company hereby submits itself to the jurisdiction of this Court and agrees to abide by [fol. 14] all orders and decrees of the Court, intermediate or final, or to pay the amount awarded by the final decree, rendered by this Court or by an Appellate Court if an appeal intervene, with interest as aforesaid, unless the amount or value of petitioner's interest in said tug EASTERN CITIES and her pending freight, shall be paid into Court by petitioner or a stipulation for value therefor shall be given as aforesaid in the meantime, in which event this stipulation shall be void.

Dated: New York, N. Y., October 5th, 1954.

Lake Tankers Corporation. By: Edward K. Bachman, Vice President, The Federal Insurance Company, By: Arthur A. Kuhne, Assistant Secretary.

Attest:

Theodore G. Lindsay, Assistant Secretary.

And:

Adelaide Natale, Attorney-in-fact.

Countersigned:

Chubb & Son, By: Charles G. Stacknik, Resident Agent—New York, N. Y.

[fols. 15-15a] *Duly sworn to by Edward K. Bachman. Jurat omitted in printing.*

[fol. 15b] Approved: 10/8/54. William V. Connell, Clerk.

[fol. 16] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER FOR MONITION AND INJUNCTION—October 8, 1954

A petition having been filed herein on October 6, 1954, by Lake Tankers Corporation, claiming the benefit of the limitation of liability provided for in the Revised Statutes of the United States and the various statutes supplementary thereto and amendatory thereof, and also contesting the liability of petitioner independently of the limitation of liability claimed under said statutes, for any and all losses, damages, injuries and destruction done, occasioned or incurred by or resulting from the collision set forth in the petition, which occured on July 10, 1954, or at any time during the voyage upon which petitioner's vessels were then engaged; and said petition also stating the facts and circumstances upon which said exoneration from and limitation of liability are claimed; and on reading and filing the affidavits of Robert B. Mitchell, Jr., Charles F. Kellers and H. S. Woodman, all sworn to September 30, 1954, as to the value of tug EASTERN CITIES and her pending freight, and the *interim* stipulation for value executed by Lake Tankers Corporation and The Federal Insurance Company in the sum of $118,542.21 with interest from October 5, 1954; and said stipulation having been approved by the Court and files herein on or about October 8, 1954, and it appearing that claims have been made and actions at law have been [fol. 17] begun against petitioner for losses, damages, injuries and destruction alleged to have occurred in consequence of the aforesaid collision;

Now, on motion of Burlingham, Hupper & Kennedy, proctors for petitioner, it is

Ordered that a monition issue out of and under the seal of this Court citing all persons claiming damages for any and all losses, damages, injuries or destruction done, occasioned or incurred by or arising out of, or consequent upon, said collision of July 10, 1954, or arising during the

voyage upon which petitioner's vessels were then engaged, and all persons having any claims against the said tug EASTERN CITIES, her engines, equipment, etc. or her pending freight to appear before this Court and file due proof of their respective claims, under oath, with the Clerk of this Court at the United States Court House, Foley Square, New York, 7, N. Y., on or before November 26, 1954, at 10:00 o'clock in the forenoon, and to serve upon or mail to the proctors for the petitioner a copy thereof, or be defaulted, subject to the right of any person to controvert or question the same, with liberty also to any person or persons claiming damages as aforesaid who shall have presented his or their claims to the Clerk of this Court to answer said petition; and it is further

Ordered that public notice of said monition be given as provided by United States Supreme Court Admiralty Rule 51, by publication of a notice in the New York Law Journal, a newspaper published in the Borough of Manhattan, City, County and State of New York, once in each week for four successive weeks before the return date of said monition, and that petitioner, not later than the day of the second publication, shall mail a copy of said notice to every person [fol. 18] known to have asserted any claim against the vessel or petitioner and to his proctor or attorney, if known; and it is further

Ordered that the beginning or prosecution of any and all suits, actions or proceedings of any nature or description whatsoever against petitioner herein and/or against tug EASTERN CITIES, except in the present proceeding, in respect of any claim arising out of, occasioned by, consequent upon or connected with the aforesaid occurrences arising during the voyage upon which the EASTERN CITIES was then engaged, be and they hereby are stayed and restrained until the hearing and determination of this proceeding; and it is further

Ordered that service of this order as a restraining order be made within this district in the usual manner, or, in any other district, by the United States Marshal for such district, by delivering a copy of this order to the person or persons to be restrained, or to his or their respective proctors or attorneys.

At New York, N. Y. in said Southern District on October 8th, 1954.

Archie O. Dawson, U.S.D.J.

Burlingham, Hupper & Kennedy, Proctors for Petitioner, 27 William Street, New York City 5.

[fol. 19] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTIONS—Filed November 8, 1954

SIRS:

Please take notice that upon the annexed exceptions to the petition herein and the affidavit of N. LeVan Haver, sworn to the 2nd day of November 1954, the undersigned, proctors for claimant Lillian M. Henn as Administratrix of the Goods, Chattels and Credits of Robert C. Henn, Deceased, appearing especially herein, will move this Court at a stated term for the hearing of motions to be held at the United States Court House, Folgy Square, New York, N.Y. on the 12th day of November 1954 at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard for (1) an order sustaining said exceptions, (2) a final decree dismissing the petition herein and vacating the injunction heretofore entered on October 8th, 1954; and they will ask for such other and further relief as to the Court may seem just and proper in the premises.

Dated Poughkeepsie, N.Y., November 4th, 1954.

Rosen & Rosen, Proctors for Claimant, Lillian M. Henn, Appearing Specially, 11 Market Street, Poughkeepsie, New York.

To: Burlingham, Hupper & Kennedy, Esqs., Proctors for Petitioner, 27 William Street, New York, N.Y.

[fol. 20] [Title omitted]

CLAIMANT'S EXCEPTIONS TO PETITION

The claimant Lillian M. Henn, as Administratrix of the Goods, Chattels and Credits of Robert C. Henn, Deceased, appearing specially herein, hereby excepts to the petition herein upon the following grounds:

1. In that although the petition was filed by petitioner Lake Tankers Corporation, as owner of the tank barge L.T.C. No. 38 which is described in detail therein and with respect to which petitioner alleges that it exercised due diligence to make said tank barge seaworthy and that it was tight, staunch, strong, fully manned, equipped and supplied by petitioner and in all respects seaworthy and fit for the services in which it was engaged, and further alleges that the collision and loss of life and personal injuries, described in said petition, were not caused or contributed to by any fault, neglect, design or want of care on the part of petitioner or said barge L.T.C. No. 38, said petition fails to allege the claimed value of petitioner's interest in said barge and her pending freight and further fails to allege that, subject to an appraisal, petitioner offers an ad interim stipulation for value for the aggregate value of its interest in said barge and her pending freight, and further fails to allege that petitioner is ready and willing, [fol. 21] whenever ordered by the Court, to give a stipulation for the payment into Court of the amount or value of its interest in said barge and her pending freight.

2. In that although petitioner seeks exoneration and limitation from all liability, as owner of the barge L.T.C. No. 38, it has failed to surrender or offer to surrender, as required by the applicable Statutes and Rules, the vessel with respect to which such exoneration and limitation are sought and, therefore, such exemption cannot be claimed in this proceeding.

Rosen & Rosen, Proctors for Claimant, Lillian M. Henn, Appearing Specially, 11 Market Street, Poughkeepsie, New York

[fol. 22] [Title omitted]

AFFIDAVIT OF N. LEVAN HAVER

STATE OF NEW YORK,
County of Ulster, ss:

N. LeVan Haver, being duly sworn, deposes and says:

That he is of counsel with Rosen & Rosen, Esqs. proctors for claimant Lillian M. Henn as Administratrix of the Estate of Robert C. Henn Deceased in the above entitled matter and is familiar therein. This affidavit is submitted in support of the exceptions of Lillian M. Henn, appearing specially, to the petition herein.

Robert C. Henn lost his life on July 10th, 1954 and left him surviving his said widow Lillian M. Henn and three daughters of ages nine, five and three years respectively. At the time of his death he was thirty-six years of age, was in good health and gainfully employed.

At about 12:45 A.M. on July 10th, 1954 said Robert C. Henn was lawfully a passenger on the motor yacht BLACKSTONE and was proceeding in the Hudson River when it was collided with by the oil barge L.T.C. No. 38, in tow of the diesel tug EASTERN CITIES, south of Esopus Meadows Light [fol. 23] House in the County of Ulster while the said motor yacht BLACKSTONE was proceeding in a generally southerly direction and the tug EASTERN CITIES and barge L.T.C. No. 38 were proceeding in a generally northerly direction in the said river.

On or about September 22nd, 1954 suit was instituted in Supreme Court for the State of New York, Ulster County, by Lillian M. Henn, as administratrix of the Estate of Robert C. Henn Deceased, represented by Rosen & Rosen, Esqs. against Lake Tankers Corporation, as owner of the tug EASTERN CITIES and tank barge L.T.C. No. 38 and one Clyde Roan, as owner of the yacht BLACKSTONE, to recover damages for the death of said Robert C. Henn, caused by the collision aforesaid and claiming damages in the sum of $500,000. A true and complete copy of said complaint is annexed to this affidavit, made a part hereof and marked Exhibit A.

In said complaint it was alleged, among other things, and particularly in paragraphs 4, 7 and 9 therof as follows:

> "4. That at all the times herein concerned the defendant, Lake Tankers Corporation, owned, operated, managed and controlled the diesel tug EASTERN CITIES and the oil barge L.T.C. #38.
>
> . . . . . .
>
> 7. That upon information and belief, that heretofore and on July 10th, 1954, at about 12:45 A.M., the said Robert C. HENN was lawfully and prudently a passenger on the motor yacht BLACKSTONE, which vessel was proceeding in a general southerly direction near the center of the Hudson River south of Esopus Meadows Light House in the County of Ulster, and State of New [fol. 24] York; and the said diesel tug EASTERN CITIES was pushing the oil barge L.T.C. No. 38 in a general northerly direction on the said River; and at said time and place, and solely through the negligence of Lake Tankers Corporation, by its agents, servants, employees, officers and crew in charge of the operation, management and control of said tug and barge, and of the defendant Clyde Roan, said vessel BLACKSTONE and the said barge as pushed by the said diesel tug were caused to collide and come together."
>
> . . . . . .
>
> 9. That the death of said Robert C. Henn was due solely through the carelessness and negligence of the defendants herein."

It will be noted that there was pleaded ownership, operation and control of both the diesel tug EASTERN CITIES *and the oil barge L.T.C. No. 38* and that the death of Robert C. Henn was caused "through the negligence of Lake Tankers Corporation, by its agents, servants, employees, officers and crew in charge of the operation, management and control of said tug *and barge*".

The within limitation proceeding was instituted by the filing on October 6th, 1954 of the petition of Lake Tankers Corporation and in which it seeks exoneration from and

limitation of all liability. A copy of the petition is annexed hereto, made a part hereof and marked Exhibit B. The usual restraining order, based on the said petition, issued and particularly referred to "petitioner's *vessels*". It enjoined the prosecution of claimant's State Court action against petitioner. It will be noted that the petition is filed on behalf of Lake Tankers Corporation not only as owner of the tug EASTERN CITIES but also as owner of the tank barge L.T.C. No. 38:

> [fol. 25] "First: The petitioner is now and was at the times hereinafter mentioned a Delaware corporation having an office for the transaction of business at 21 West Street, New York, N. Y., within this District, and was owner of the tug EASTERN CITIES *and the barge L.T.C. No. 38.*"

By the Second Article of the petition, petitioner makes allegations of its due diligence with respect not only to the tug EASTERN CITIES but to the tank barge L.T.C. No. 38 which is described in the petition as is the tug EASTERN CITIES:

> "Second: The EASTERN CITIES is a steel tug of 146 gross tons and 98 net tons register, 81.1 feet long, 24 feet beam, built in 1943. *The L.T.C. No. 38 is a steel tank barge 229.5 feet long and 42.8 feet beam*, without motive power of her own. Petitioner used diligence to make *said vessels* seaworthy and at the time of the loss hereinafter set forth, and at and prior to the commencement of the voyage upon which said loss occurred, *they* were tight, staunch, strong, fully manner, equipped and supplied, and in all respects seaworthy and fit for the services in which *they* were engaged."

By Article Third of the petition it is alleged among other things, with respect to the tug EASTERN CITIES and the barge L.T.C. 38: "both vessels were exhibiting regulation navigation lights".

By Article Fourth of the petition it is alleged that there was no fault, neglect, design or want of care on the part of the petitioner "or the EASTERN CITIES *or No. 38*, or of *anyone* for whom petitioner may be responsible."

Nevertheless, although the suit instituted in Supreme Court of the State of New York, Ulster County alleged [fol. 26] operation and control of the oil barge L.T.C. No. 38 in Lake Tankers Corporation and negligence on the part of said defendant with respect to the said barge, as well as the tug, and though the petition was filed herein by Lake Tankers Corporation, as owner of the barge, as well as the tug, and petitioner has also alleged its exercise of due diligence with respect to the barge, and further has alleged that it was exhibiting regulation navigation lights, which is denied by the claimant Lillian M. Henn and will be one issue for trial between the parties, the petition herein, in Article Eight, makes no reference whatever to the value of the barge L.T.C. No. 38 and her pending freight for the voyage on which she was then engaged. It recites only that the value of the tug EASTERN CITIES was $110,000 and that her pending freight was $8,542.21 and petitioner states that it is informed and believes "that the entire aggregate value of its interest in said tug EASTERN CITIES and her pending freight at the end of the voyage upon which the loss occurred does not exceed the sum of $118,542.21", for which amount it offers an ad interim stipulation for value, "said sum being not less than the aggregate value of petitioner's interest in said tug and her pending freight." Further, though by Article Ninth petitioner alleges that there are no demands, claims or unsatisfied liens against the tug EASTERN CITIES or her pending freight, "or any suits or actions pending thereon so far as is known to petitioner except as set forth above", petitioner fails to recite in Article Sixth of its petition that the suit which was instituted by Lillian M. Henn, as Administratrix of the Estate of Robert C. Henn, Deceased, against the petitioner made allegations of operation and control of the oil barge L.T.C. No. 38 in petitioner and specifically charged petitioner, its [fol. 27] agents, servants and employees with fault as owner and operator of the said barge.

Accordingly, it is clear that in seeking, by this proceeding, exoneration from or limitation of *all* liability which it might have to the claimant Lillian M. Henn, the petitioner has signally failed to comply with the Statutes and applicable

Admiralty Rules of the Supreme Court of the United States. Though it has recognized the allegations of fault made in the State Court action by said Lillian M. Henn with respect to the barge L.T.C. No. 38, and has filed its petition as owner of the said barge it has failed to offer an ad interim stipulation for value on behalf of the barge and her pending freight or, in fact, to file such ad interim stipulation for value on behalf of the barge and her pending freight or, in fact, to file such ad interim stipulation, but has sought by merely posting ad interim security on behalf of the tug EASTERN CITIES *to have it decreed that it is entitled* to exoneration from and limitation of *all* liability. Further it has improperly obtained injunctive relief against the claimant with respect to the State Court litigation.

Accordingly it is respectfully submitted that by reason of the petitioner's failure herein, claimant's exceptions to the petition should be sustained, the petition herein should be dismissed and the restraining order heretofore entered on October 8th, 1954 should be vacated; and it is further respectfully prayed that claimant, Lillian M. Henn, may have such other and further relief as to the Court may seem just and proper in the premises.

N. LeVan Haver.

Sworn to before me this 2nd day of November 1954.

Charles H. Gaffney, Notary Public in the State of New York, resident in and for Ulster County, Commission expires March 30, 1956.

[fol. 28] EXHIBIT "A" TO AFFIDAVIT

SUPREME COURT, ULSTER COUNTY

LILLIAN M. HENN, as Administratrix of the Goods, Chattels and Credits of Robert C. Henn, deceased, Plaintiff,

against

LAKE TANKERS CORPORATION and CLYDE ROAN, Defendants

The plaintiff, by Rosen and Rosen, her attorneys, complaining of the defendants herein, alleges:

1. That at all the times herein concerned the plaintiff was a resident of the State of New York and that the decedent, Robert C. Henn was a resident of the County of Dutchess and State of New York.

2. That at all the times herein concerned Clyde Roan was a resident of the County of Ulster and State of New York and was the owner and operator of and in control of the motor yacht BLACKSTONE, proceeding a general southerly direction.

3. That at all the times herein concerned the defendant, Lake Tankers Corporation was a foreign corporation, organized and existing under and by virtue of the laws of the State of Delaware with its principal place of business at 100 West 10th Street, Wilmington, Delaware, and maintaining an office for the purpose of doing business in the State of New York at 21 West Street, New York, New York, and as such, engaged in the marine transportation business.

4. That at all the times herein concerned the defendant, Lakes Tanker Corporation, owned, operated, managed and controlled the diesel tug, EASTERN CITIES and the oil barge, L.T.C. #38.

[fol. 29] 5. That at all the times herein concerned the Hudson River, at a point a short distance southerly of Esopus Meadows Light House, in the County of Ulster and State of New York, was a well traveled, navigable river and public highway of the State of New York.

6. That Robert C. Henn, the above decedent, died intestate upon information and belief, in Ulster County, in the

State of New York, on July 10th, 1954; and thereafter on September 20, 1954, Letters of Administration of the goods, chattels and credits of said Robert C. Henn, deceased were duly issued to the plaintiff, Lillian M. Henn, by the Surrogate's Court of the County of Dutchess, and State of New York, and that said Lillian M. Henn has duly qualified as such Administratrix and is still acting as such.

7. That upon information and belief, that heretofore and on July 10th, 1954, at about 12:45 a.m., the said Robert C. Henn was lawfully and prudently a passenger on the motor yacht BLACKSTONE, which vessel was proceeding in a general southerly direction near the center of the Hudson River south of Esopus Meadows Light House in the County of Ulster, and State of New York; and the said diesel tug EASTERN CITIES was pushing the oil barge LTC #38 in a general northerly direction on the said River; and at said time and place, and solely through the negligence of Lake Tankers Corporation, by its agents, servants, employees, officers and crew in charge of the operation, management and control of said tug and barge, and of the defendant Clyde Roan, said vessel BLACKSTONE and the said barge as pushed by the said diesel tug were caused to collide and come together.

8. That by reason of the foregoing accident and collision the said Robert C. Henn did sustain injuries resulting in his death by drowning at said time and place.

[fol. 30] 9. That the death of said Robert C. Henn was due solely through the carelessness and negligence of the defendants herein.

10. That the said Robert C. Henn, deceased, left him surviving his wife, Lillian M. Henn, the Administratrix herein; his daughter, Stephanie C. Henn, aged 9 years; his daughter, Victoria Linda Henn, aged 5 years; and his daughter, Sharon Virginia Henn, aged 3 years, as his next of kin; and at the time of his death the decedent, Robert C. Henn was 36 years of age and prior thereto was in good health and gainfully employed; and that by reason of the foregoing, the aforementioned next of kin have been damaged by his death, all in the sum of Five Hundred Thousand Dollars ($500,000.00).

Wherefore, plaintiff demands judgment against the defendants herein the amount of Five Hundred Thousand

Dollars ($500,000.00), together with the costs and disbursements of this action.

Rosen & Rosen, Attorneys for Plaintiff, Office & P.O. Address 11 Market Street, Poughkeepsie, New York.

Exhibit B (Petition) omitted. Printed side page 1 ante.

[fol. 31] IN UNITED STATES DISTRICT COURT

MEMORANDUM DECISION OF RYAN, D. J., DENYING MOTION TO DISMISS PETITION—DECEMBER 16, 1954

Movant, appearing specially, asks that the petition for limitation be dismissed and the order staying prosecution of her claim be vacated unless petitioner surrender its interest in barge L.T.C. No. 38.

Movant's intestate was a passenger on a yacht which collided with the barge while in tow of the tug Eastern Cities on the night of July 10, 1954. Prior suit against petitioner in the state court for this alleged wrongful death has been stayed.

[fol. 32] The petition herein admits ownership and control of both barge and tug, alleges their seaworthiness, denies negligence and offers interim stipulation of value of tug only. The petition prays that if liability be determined adversely it be limited to petitioner's interest in the tug and that any suit "against petitioner . . . or against tug Eastern Cities" be stayed. The order on monition directed filing of all claims against the tug arising from the collision; it stayed all suits against petitioner and/or tug Eastern Cities.

Although movant has not filed a claim in these limitation proceedings she may except to the petition. *E. I. DuPont* v. *Bentley*, 19 F. 2d 354. Exception has been taken because the barge has not been surrendered and no interim stipulation filed for her value.

The dissimilar conclusions reached in the cases dealing with the necessity of surrender of all vessels involved in an

accident demonstrate that the "turning point in all of them is, what are the real facts controlling in them." *The Alvah H. Boushell*, 38 F. 2d 980, 981. It was there held that where the inactive tug contributed to the collision by its very failure to act in aid of the active tug, both were considered as one vessel—"the unit to be surrendered to justify a limitation of liability" (p. 982). In *The Columbia*, 73 Fed. 226, a barge having no motive power was ordered surrendered since it, with the tug, became one vessel for the purposes of the voyage. In both *Liverpool Nav. Co.* v. *Brooklyn Terminal*, 251 U. S. 48, 53 (the court noting, "if you surrender the offending vessel you are free"), and in the *Transfer No. 21*, 248 Fed. 459, 461 (the court noting, "a tow without motive power, alongside a tug and moved by it, cannot be at fault"), there was a factual finding that the floats which were not surrendered were or could not have been contributing causes of the collision. There is no real conflict in the law applicable; the different results reached arise from the facts present.

[fol. 33] The collision here occurred at night. Movant claims that a contributing cause was improper lighting of the barge. The petition alleges that both vessels were exhibiting regulation navigation lights. A factual issue has been presented for trial. If the barge was not equipped with proper lights, as movant asserts, it cannot now be said that she was not an offending vessel merely because she was without motive power and under the control of the tug. *The Asfalto*, 45 F. 2d. 857. "When two vessels of the same owner contribute to a disaster, the owner may not limit liability without surrendering his interest in both vessels." *United States* v. *The Australia Star*, 172 F. 2d 472, 478 (C. A. 2, 1949).

Whether the barge was a contributing factor to the collision has been put in issue by the allegations of the petition and the contention of the movant on this motion.

Motion to dismiss the petition, however, is denied. Petitioner may file an interim stipulation for the value of the barge in which event the order restraining suits against it and/or the Eastern Cities will remain in force; upon failure to do so within 10 days the order will be modified so as

to restrain suits outside of this proceeding only with respect to those brought against the Eastern Cities. Movant shall have twenty days from the date on which the stipulation is filed and approved to file her claim in this proceeding.

Settle order.

Dec. 16, 1954.

Sylvester J. Ryan, *U. S. D. J.*

[fol. 34] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER DENYING MOTION TO DISMISS THE PETITION AND FOR FILING OF AN AD INTERIM STIPULATION, ETC.—January 26, 1955

Claimant, Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn deceased, having appeared specially herein and having moved at a Stated Term for the hearing of motions on the 9th day of November 1954 for an order sustaining her exceptions to the petition herein and for a final decree dismissing the petition and vacating the restraining order heretofore entered on October 8th, 1954 and Rosen & Rosen, Esqs. by N. LeVan Haver, Esq. and Frank C. Mason, Esq. having appeared on behalf of claimant in support of the motion and Burlingham, Hupper & Kennedy, Esqs. by Eugene Underwood, Esq. having appeared on behalf of the petitioner in opposition thereto and due deliberation having been had, now on motion of Rosen & Rosen, proctors for claimant Lillian M. Henn, it is

Ordered that the motion to dismiss the peition herein is in all respects denied, and it is further

Ordered that within ten days after service of a copy of this order, with notice of entry thereof, upon petitioner's

proctors the petitioner may file for approval as to form and sufficiency of surety, an ad interim stipulation for the value of its interest in the barge L.T.C. No. 38, in which event the restraining order heretofore entered herein [fol. 35] on October 8th, 1954 will remain in full force and effect, and it is further

Ordered that in the event the petitioner shall fail to file for such approval the aforesaid ad interim stipulation within the prescribed ten day period, the restraining order entered on October 8th, 1954, thereupon shall be deemed, by the terms of this order, to be modified to the extent that it shall restrain suits outside of this proceeding only with respect to those brought against the tug EASTERN CITIES and/or petitioner as owner and operator of that vessel, and it is further

Ordered that claimant shall file her claim and answer herein within twenty days after the aforesaid ad interim stipulation shall have been filed and approved, or if such stipulation shall not have been filed within the prescribed period, the claimant shall file her claim and answer herein as against the tug EASTERN CITIES only within twenty days after petitioner's default in such filing.

Dated New York, N. Y., January 26th, 1955.

Sylvester J. Ryan, *U. S. D. J.*

[fol. 36] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

SUPPLEMENTAL AD INTERIM STIPULATION FOR VALUE ON BEHALF OF BARGE LTC NO. 38—Filed February 10, 1955

Whereas a petition was duly filed in the office of the Clerk of this Court on October 6, 1954, by Lake Tankers Corporation, as owner of tug EASTERN CITIES and barge L.T.C.

No. 38, for exoneration from or limitation of liability in respect of the collision between barge L.T.C. No. 38 in tow of tug EASTERN CITIES and yacht BLACKSTONE on July 10, 1954, and the subsequent sinking of yacht BLACKSTONE; the amount of its interest in said tug EASTERN CITIES and or barge L.T.C. No. 38 after said collision and their freight and towage moneys then pending; and

Whereas by order of this Court entered herein on October 10, 1954, an interim stipulation for the value of tug EASTERN CITIES and her pending freight in the total amount of $118,542.21 was approved and filed herein on October 8, 1954; and

Whereas an order was entered in the office of the Clerk of this Court on January 27, 1955, which, among other things, provided that within 10 days after the service of a copy of said order upon the proctors for petitioner, the petitioner shall file an additional interim stipulation for the value of barge L.T.C. No. 38 in order to prevent the modification of [fol. 37] the restraining order entered herein on October 8, 1954; and

Whereas the value of said barge L.T.C. No. 38 has been fixed by agreement for the purpose of bonding in this proceeding at the sum of $165,000, with interest thereon from October 8, 1954, as appears by the stipulation at the foot hereof, the petitioner herein, as owner of barge L.T.C. No. 38, hereby consents and agrees that, if the claimants herein recover, a decree may be entered against it for an amount not exceeding the above-stated amount, with interest thereon from October 8, 1954, and that thereupon execution therefor may issue against it and its goods, chattels, lands and tenement or other real estate.

Now, therefore, the condition of this stipulation is such that if Lake Tankers Corporation, the petitioner herein, having its office and principal place of business at No. 21 West Street, in Borough of Manhattan, City, County and State of New York, shall abide by all orders and or decrees of this Court and pay the amount awarded by the final decree entered herein by this Court and or by an appellate court if an appeal intervene, with interest aforesaid, then

this stipulation shall be void, otherwise to remain in full force and virtue.

Dated: New York, N. Y.

February 7, 1955

Lake Tankers Corporation, By
Edward K. Bachman, Vice President.

Attest:

Alice E. Van Why, Secretary.

[fol. 38] *Duly sworn to by Edward K. Bachman. Jurat omitted in printing.*

APPROVAL OF STIPULATION—February 7, 1955

The value of barge L.T.C. NO. 38 is hereby fixed, for the purpose of bonding in this proceeding, at the sum of One hundred Sixty-Five thousand Dollars ($165,000), with interest thereon from October 8, 1954, and the foregoing stipulation is approved as to form, amount and sufficiency of surety.

Dated: New York, N. Y. February 7th, 1955.

Rosen & Rosen, Proctor for Claimant

[fol. 39] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

CLAIM OF LILLIAN M. HENN—Filed March 1, 1955

And now comes Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn, deceased and makes claim against the above named Lake Tankers

Corporation and the tug EASTERN CITIES and the barge L.T.C. No. 38 as follows:

That on the early morning of July 10th, 1954, the above named deceased Robert C. Henn was a passenger on board the motor yacht BLACKSTONE, which was proceeding in a generally southerly direction in the Hudson River between Kingston and Poughkeepsie, when the barge L.T.C. No. 38 in tow of the tug EASTERN CITIES, northbound, came into collision with the said yacht BLACKSTONE, as a result whereof the said yacht sank and the aforesaid Robert C. Henn was killed, without fault on his part and left him surviving his widow the said Lillian M. Henn and three minor children of ages nine years, five years and four years as his next of kin.

That the said collision was caused by and contributed to by the fault and negligence of those in charge of the said tug EASTERN CITIES and barge L.T.C. No. 38.

[fol. 40] That on September 20th, 1954 letters of administration of the goods, chattels and credits of said Robert C. Henn, deceased, were duly issued to the claimant Lillian M. Henn, by the Surrogate's Court of the County of Dutchess and State of New York, and that said Lillian M. Henn has duly qualified as such Administratrix and is still acting as such.

The said claimant is entitled to maintain an action and claim to recover damages for the death thus occasioned, and hereby claims $250,000 as the amount of such damages, no part of which has been paid.

Rosen & Rosen, Proctors for Claimant, Office & P. O. Address, 11 Market Street, Poughkeepsie, New York.

[fol. 41] *Duly sworn to by Lillian M. Henn. Jurat omitted in printing.*

[fol. 42] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER OF CLAIMANT—Filed March 1, 1955

Claimant, Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn, deceased, by her proctors Rosen & Rosen, for her answer to the petition herein alleges on information and belief:

First: Denies that she has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Article First of the petition.

Second: Denies that she has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Article Second of the petition.

Third: Denies each and every allegation contained in Article Third of the petition, except as hereinafter specifically admitted or alleged.

Fourth: Denies each and every allegation contained in Article Fourth of the petition wherein it is alleged that the collision and resulting damages were not caused or contributed to by any fault, neglect, design or want of care on the part of petitioner or the tug EASTERN CITIES or the barge L.T.C. No. 38 or of any one for whom petitioner may be responsible.

[fol. 43] Fifth: Denies each and every allegation contained in Article Fifth of the petition.

Sixth: Denies that she has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Article Sixth of the petition, except that she admits that on or about September 22nd, 1954 an action was commenced in Supreme Court of the State of New York, Ulster County by this claimant as Administratrix of the Estate of Robert C. Henn, deceased against petitioner, as owner and operator of the tug EASTERN CITIES and barge L.T.C. No. 38 and against Clyde Roan, as owner of the yacht BLACKSTONE, to recover damages for the death of Robert C. Henn, that in said complaint she

claimed damages in the amount of $500,000 and that her attorneys are Rosen & Rosen, 11 Market Street, Poughkeepsie, New York.

Seventh: Denies that she has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Article Seventh of the petition.

Eighth: Denies each and every allegation contained in Article Eighth of the petition.

Ninth: Denies that she has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Article Ninth of the petition.

Tenth: Denies each and every allegation contained in Article Tenth of the petition.

Eleventh: Denies each and every allegation contained in Article Eleventh of the petition, except that she admits the [fol. 44] Admiralty and Maritime jurisdiction of the United States and of his Honorable Court.

FURTHER ANSWERING THE SAID PETITION CLAIMANT ALLEGES ON INFORMATION AND BELIEF THAT THE TRUE FACTS AND CIRCUMSTANCES WERE AS FOLLOWS:

Twelfth: On the early morning of July 10th, 1954 the above named deceased Robert C. Henn was a passenger on board the motor yacht BLACKSTONE, which was proceeding in a generally southerly direction in the Hudson River between Kingston and Poughkeepsie, when the barge L.T.C. No. 38 in tow of the tug EASTERN CITIES, northbound, came into collision with the said yacht BLACKSTONE as a result whereof the said yacht sank and the aforesaid Robert C. Henn was killed, leaving him surviving as his next of kin his widow, this claimant, and three minor children of ages nine years, five years and four years.

Thirteenth: That the aforesaid collision and loss of life of said Robert C. Henn was caused by and contributed to by the fault and negligence of petitioner and those in charge of its tug EASTERN CITIES and its barge L.T.C. No. 38 in that they failed to maintain a proper and efficient lookout, in that the tug failed to observe the yacht BLACKSTONE in due season and to take precautionary measures to avoid collision, in proceeding at an immoderate speed under the

circumstances, in failing to stop and reverse in time to avoid the collision, in running down the BLACKSTONE and causing the death of said Robert C. Henn, in that the barge L.T.C. No. 38 was improperly and inadequately lighted, in that prompt and efficient measures were not taken to rescue the said Robert C. Henn and in other respects which will be pointed out upon the trial of this action.

[fol. 45] Fourteenth: That all and singular the premises are true.

Wherefore claimant prays that the petition herein be dismissed with costs and that her claim be allowed accordingly with interest and costs.

Rosen & Rosen, Proctors for Claimant, Office & P. O. Address, 11 Market Street, Poughkeepsie, New York.

[fol. 46] *Duly sworn to by Lillian M. Henn. Jurat omitted in printing.*

[fol. 47] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title Omitted]

NOTICE OF MOTIONS—Filed March 19, 1955

Please take notice that on all the pleadings and proceedings heretofore had herein and the annexed affidavit of Frank C. Mason sworn to the 14th day of March 1955 the undersigned will move this Court at a Stated Term for the hearing of motions to be held at the United States Court House, Foley Square, New York, N.Y. on the 24th day of March 1955 at 10:00 o'clock in the forenoon or soon thereafter as counsel can be heard, for an order vacating the restraining order heretofore entered herein on October 8th, 1954 with respect to the suit pending in the Supreme Court, State of New York, Ulster County on behalf of claimant Lillian M. Henn, as Administratrix of the Estate of

Robert C. Henn deceased against the petitioner herein and we will ask the Court for such other and further relief as may be just in the premises.

Dated: New York, N. Y., March 14th, 1955

Rosen & Rosen, Proctors for Claimant, Lillian M. Henn, Office & P. O. Address, 11 Market Street, Poughkeepsie, New York.

To: Burlingham, Hupper & Kennedy, Esqs., Proctors for Petitioner, 27 William Street, New York, N. Y.
[fol. 48] Joseph Jiudice, Esq., Proctor Claimants, John W. VanWart, William F. Hughes, Robert D. McNutt, Robert E. Cruz, Albert H. Raymond, Jr., Ernest Cady and William V. Ratledge, 11 Market Street, Poughkeepsie, New York.
Michael Nardone, Proctors for Claimants Charles Carlson, Clyde W. Roan and John Strong, Highland, New York.

[fol. 49] [Title omitted]

AFFIDAVIT OF FRANK C. MASON

STATE OF NEW YORK,
County of New York, ss:

Frank C. Mason, being duly sworn, deposes and says:

That he is of counsel with Rosen & Rosen, Esqs., proctors for claimant Lillian M. Henn, as Administratrix of the Estate of Robert C. Henn, deceased in the above entitled matter and is familiar with the facts thereof. This affidavit is submitted in support of a motion to vacate the restraining order heretofore entered in this cause on October 8th, 1954 in so far as it enjoins the prosecution by said Lillian M. Henn of a suit which was instituted on her behalf in Supreme Court for the State of New York, Ulster County against the petitioner herein.

The decedent, Robert C. Henn, lost his life on July 10th, 1954, leaving him surviving his said widow, Lillian M. Henn and three daughters of ages nine, five and four respectively. At the time of his death he was thirty-six years of

age, was in good health and gainfully employed. At about 12:45 A. M. on July 10, 1954 while said Robert C. Henn [fol. 50] was lawfully a passenger on the motor yacht BLACKSTONE which was proceeding in the Hudson River, south of Esopus Meadows Light House in the County of Ulster, it was in collision with the oil barge L.T.C. No. 38 in tow of the diesel tug EASTERN CITIES, both owned by the petitioner herein. As a result of said disaster said Robert C. Henn was drowned and his body was never recovered.

On or about September 22nd, 1954 suit was instituted in Supreme Court for the State of New York, Ulster County by Lillian M. Henn, as Administratrix of the Estate of Robert C. Henn deceased, represented by Rosen & Rosen, Esqs., against Lake Tankers Corporation, as owner of the tug EASTERN CITIES and tank barge L.T.C. No. 38 and also against Clyde Roan, as owner of the yacht BLACKSTONE to recover damages for the death of said Robert C. Henn in the sum of $500,000. In said suit said Administratrix will be entitled to a jury trial.

Thereafter the within limitation proceeding was instituted on October 6th, 1954 by the filing of a petition by Lake Tankers Corporation, seeking exoneration from and limitation of all liability. On October 8th, 1954 the usual restraining order, based on the said petition, issued and by its terms the prosecution of claimant's State Court action against petitioner was enjoined. A true copy of such restraining order is annexed hereto, made a part hereof and marked Exhibit A.

Upon the filing of the petition, petitioner filed also an ad interim stipulation for value in the sum of $118,542.21, representing the alleged aggregate value of petitioner's inter- [fol. 51] est in the tug EASTERN CITIES and her pending freight at the termination of the voyage on which she was engaged at the time the loss occurred. Subsequently, pursuant to the order of this Court entered January 27th, 1955, pursuant to a hearing before Honorable Sylvester J. Ryan, the petitioner filed an ad interim stipulation for value of the barge L.T.C. No. 38 in the sum of $165,000. Accordingly the limitation fund in this proceeding is in the total amount of $283,542.21.

Pursuant to notice given in the proceeding claims have

been filed, as reported by the petitioner, eleven in number, made up as follows:

Claimant	Amount	Nature	Attorney or Proctor
1. John W. Van Wart	$ 50.00	Property loss and damage	Joseph Jiudice, 11 Market Street Poughkeepsie, N. Y.
2. William F. Hughes	50.00	"	Same
3. Robert D. McNutt	50.00	"	Same
4. Robert E. Cruz	225.00	"	Same
5. Albert H. Raymond, Jr.	50.00	"	Same
6. Ernest Cady	50.00	"	Same
7. William B. Ratledge	50.00	"	Same
8. Charles Carlson	3,000.00	Personal injury and property loss and damage	Michael Nardone, Highland, N. Y.
9. Clyde W. Roan	4,400.00	"	Same
10. John Strong	1,600.00	"	Same
11. Lillian M. Henn Administratix	250,000.00	For death of Robert C. Henn	Rosen & Rosen, 11 Market Street, Poughkeepsie, N. Y.
making a total of claims filed of	$259,525.00		

Accordingly the limitation fund herein of $283,542.21 is clearly in excess of the total amount of the claims filed.

The claimant Lillian M. Henn hereby consents to reduce her claim in the State Court action aforesaid to the [fol. 52] amount claimed in this proceeding, namely $250,000 and stipulates that she will not enter judgment in excess of that amount in the State Court proceeding. She further is prepared to enter into any formal stipulation with petitioner in further compliance of these conditions. Upon such consent and stipulation, it is respectfully submitted, that the restraining order heretofore entered on October 8th, 1954 should be vacated as to this claimant and the suit pending in her behalf in New York State Supreme Court, Ulster County.

Wherefore it is respectfully prayed that claimant's motion herein be granted.

Frank C. Mason.

Sworn to before me this 14th day of March 1955.

Gladys A. White, Notary Public, State of New York, No. 43-9641600, Qualified in Richmond County, Cert. filed in New York Co. Clerks, Commission Expires March 30, 1956.

[Seal.]

EXHIBIT A (ORDER FOR MONITION AND INJUNCTION)

Omitted. Printed side page 16 ante.

[fol. 53] Acknowledgment of service (omitted in printing).

[fol. 54] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER DENYING MOTION TO VACATE THE RESTRAINING ORDER ENTERED OCTOBER 8, 1954, WITHOUT PREJUDICE, ETC.— August 10, 1955

Claimant Lillian M. Henn, Administratrix; by notice of motion dated March 14, 1955 having moved for an order vacating the restraining order entered herein on October 8, 1954 with respect to the action pending in the Supreme Court of the State of New York, Ulster County, brought by said claimant as Administratrix of the goods, chattels and credits of Robert C. Henn, deceased, against the petitioner herein; and said motion having regularly come on to be heard at a term of this Court for the hearing of motions, and Frank C. Mason, Esq., having appeared of counsel in support of the motion, and Eugene Underwood, Esq., of counsel for petitioner, having appeared in opposition thereto, and the Court after due deliberation having filed its opinion on July 14, 1955 denying the motion but without prejudice to a further application to be made on certain conditions;

Now, on the notice of motion dated March 14, 1955, the affidavit of Frank C. Mason, Esq., sworn to March 14, 1955 and the affidavit of Eugene Underwood, Esq., sworn to April 6, 1955, on the opinion of this Court filed herein on [fol. 55] July 14, 1955, and on all the proceedings heretofore had herein, it is, by the Court,

Ordered that the motion of Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn, deceased, for an order vacating the restraining order entered herein on October 8, 1954 be, and it hereby is in all respects denied but without prejudice to a further application by said claimant in the event appropriate stipulations are filed bringing the total amount of claims filed herein within the amounts of the respective interim stipulations heretofore filed herein on behalf of the tug EASTERN CITIES and the Barge LTC No. 38.

Dated: New York, N. Y., August 10, 1955.

Edward Weinfeld, U. S. D. J. H.A.C.

[fol. 56] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION—August 4, 1955

SIRS:

Please Take Notice that an order, of which the within is a copy, will be presented for settlement and signature to the Honorable Edward Weinfeld, United States District Judge, at the office of the Clerk of this Court in the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 10th day of August, 1955, at 11:00 o'clock in the forenoon of that day.

Dated: New York, N. Y., August 4, 1955.

Yours, etc., Burlingham, Hupper & Kennedy, Proctors for Petitioner, Office & P. O. Address, 27 William Street, Borough of Manhattan, City of New York.

To: Messrs. Rosen & Rosen, Proctors for Claimant, Lillian M. Henn, Admx., 11 Market Street, Poughkeepsie, New York.

Frank C. Mason, Esq., of Counsel, 25 Broadway, New York, New York.

[fol. 57] Proof of service (omitted in printing).

[fol. 58] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION OF CLAIMANT LILLIAN M. HENN

Claimant Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn deceased who has, by her proctors Rosen & Rosen, heretofore filed a claim in this limitation proceeding in the amount of $250,000 hereby stipulates:

1. That her claim as against the tug EASTERN CITIES, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is hereby reduced to the sum of $100,000.

2. That her claim as against the barge L.T.C. No. 38, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is hereby reduced to the sum of $150,000.

3. That she will not increase the amount of either of said claims as against either of the said vessels, as above stated, or the petitioner and its stipulators for value at any future date beyond the amounts so stated.

4. That she will not enter judgment in any Court in excess of the stipulated amounts of her claims against petitioner as owner of either of said vessels.

[fol. 59] 5. That she hereby waives any claim of *res judicata* relevant to the issue of limited liability with respect to either of said vessels, based on a judgment in any other Court.

Dated September 6th, 1955.

Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn, deceased.

[fol. 60] *Duly sworn to by Lillian M. Henn. Jurat omitted in printing.*

[fol. 61] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF YORK

[Title omitted]

NOTICE OF MOTION TO VACATE RESTRAINING ORDER—Filed September 23, 1955

SIRS:

Please take notice that upon all the pleadings and proceedings heretofore had herein and the annexed affidavit of Frank C. Mason, sworn to the 23rd day of September 1955 the undersigned will move this Court at a Stated Term for the hearing of motions to be held at the United States Court House, Foley Square, New York, N.Y. on the 4th day of October 1955 at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order vacating the restraining order heretofore entered herein on October 8th, 1954 with respect to the suit pending in the Supreme Court, State of New York, Ulster County on behalf of claimant Lillian M. Henn, as Administratrix of the Estate of Robert C. Henn deceased against the petitioner herein and we will ask the Court for such other and further relief as may be just in the premises.

Dated New York, N.Y., September 23rd, 1955.

Rosen & Rosen, Proctors for Claimant, Lillian M. Henn, Office & P. O. Address, 11 Market Street, Poughkeepsie, New York.

To: Burlingham, Hupper & Kennedy, Esqs., Proctors for Petitioner, 27 William Street, New York, N. Y.

[fol. 62] Joseph Jiudice, Esq., Proctor for Claimants, John W. VanWart, William F. Hughes, Robert D. McNutt, Robert E. Cruz, Albert H. Raymond, Jr., Ernest Cady and William V. Ratledge, 11 Market Street, Poughkeepsie, New York.

Michael Nardone, Proctor for Claimants, Charles Carlson, Clyde W. Roan and John Strong, Highland, New York.

[fol. 63] [Title omitted]

AFFIDAVIT OF FRANK C. MASON

STATE OF NEW YORK,
County of New York, ss:

Frank C. Mason, being duly sworn, deposes and says:

That he is of counsel with Rosen & Rosen, Esqs., proctors for claimant Lillian M. Henn, as Administratrix of the Estate of Robert C. Henn, deceased in the above entitled matter and is familiar with the facts thereof. This affidavit is submitted in support of a motion to vacate the restraining order heretofore entered in this cause on October 8th, 1954 in so far as it enjoins the prosecution by said Lillian M. Henn of a suit which was instituted on her behalf in Supreme Court for the State of New York, Ulster County against the petitioner herein.

The decedent, Robert C. Henn, lost his life on July 10th, 1954, leaving him surviving his said widow, Lillian M. Henn and three daughters of ages nine, five and four respectively. At the time of his death he was thirty-six years of age, was in good health and gainfully employed. At about 12:45 A. M. on July 10th, 1954 while said Robert C. Henn was [fol. 64] lawfully a passenger on the motor yacht BLACKSTONE which was proceeding in the Hudson River, south of Esopus Meadows Light House in the County of Ulster, it was in collision with the oil barge L/T.C. No. 38 in tow of the diesel tug EASTERN CITIES, both owned by the petitioner herein. As a result of said disaster said Robert C. Henn was drowned and his body was never recovered.

On or about September 22nd, 1954 suit was instituted in Supreme Court for the State of New York, Ulster County by Lillian M. Henn, as Administratrix of the Estate of Robert C. Henn deceased, represented by Rosen & Rosen, Esqs., against Lake Tankers Corporation, as owner of the tug EASTERN CITIES and tank barge L.T.C. No. 38 and also against Clyde Roan, as owner of the yacht BLACKSTONE to recover damages for the death of said Robert C. Henn in the sum of $500,000. In said suit said Administratrix will be entitled to jury trial.

Thereafter the within limitation proceeding was instituted on October 6th, 1954 by the filing of a petition by Lake Tankers Corporation, seeking exoneration from and limitation of all liability. On October 8th, 1954 the usual restraining order, based on the said petition, issued and by its terms the prosecution of claimant's State Court action against petitioner was enjoined. A true copy of such restraining order is annexed hereto, made a part hereof and marked Exhibit A.

Upon the filing of the petition, petitioner filed also an ad interim stipulation for value in the sum of $118,542.21, representing the alleged aggregate value of petitioner's inter- [fol. 65] est in the tug EASTERN CITIES and her pending freight at the termination of the voyage on which she was engaged at the time the loss occurred. Subsequently, according to the order of this Court entered January 27th, 1955, pursuant to a hearing before Honorable Sylvester J. Ryan, the petitioner filed an ad interim stipulation for value of the barge L.T.C. No. 38 in the sum of $165,000.

Pursuant to notice given in the proceeding, claims were originally filed, as reported by the petitioner, eleven in number, made up as follows:

Claimant	Amount	Nature	Attorney or Proctor
1. John W. Van Wart	$ 50.00	Property loss and damage	Joseph Jiudice, 11 Market Street Poughkeepsie, N. Y.
2. William F. Hughes	50.00	"	Same
3. Robert D. McNutt	50.00	"	Same
4. Robert E. Cruz	225.00	"	Same
5. Albert H. Raymond, Jr	50.00	"	Same
6. Ernest Cady	50.00	"	Same
7. William B. Ratledge	50.00	"	Same
8. Charles Carlson	3,000.00	Personal injury and property loss and damage	Michael Nardone, Highland, N. Y.
9. Clyde W. Roan	4,400.00	"	Same
10. John Strong	1,600.00	"	Same
11. Lillian M. Henn	250,000.00	For death of Robert C. Henn	Rosen & Rosen, 11 Market Street, Poughkeepsie, N. Y.
making a total of claims filed of	$259,525.00		

Pursuant to notice of motion and affidavit of deponent, for an order vacating the restraining order heretofore entered herein on October 8th, 1954 in so far as it enjoined the

prosecution by said Lillian M. Henn of her suit which is pending in the Supreme Court of the State of New York, Ulster County against the petitioner and claimant Clyde W. Roan, owner of the motor yacht BLACKSTONE, on April 28th, 1955, the matter was heard by Honorable Edward Weinfeld [fol. 66], at the regular motion part. A true copy of Judge Weinfeld's opinion dated July 14th, 1955 is annexed hereto and marked Exhibit B. It was the contention of the claimant that since the petitioner, at the outset of the proceedings should have filed security for both the barge L.T.C. No. 38 and the tug EASTERN CITIES of a total sum of $283,54.21 and the claims totalled $259,525, in a lesser amount than what claimant contended was the true limitation fund, the restraining order of October 8th, 1955 should be vacated or modified to permit her to prosecute her State Court suit. Judge Weinfeld has held that the security filed on behalf of the tug and the barge should be treated as separate funds and accordingly he wrote:

> "This motion is denied but without prejudice to a further application by the claimant in the event appropriate stipulations are filed bringing the claims as against each vessel within the amount of its bond".

In accordance with the opinion, an order was signed by Judge Weinfeld and entered on August 10th, 1955 as follows:

> "Ordered that the motion of Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn, deceased, for an order vacating the restraining order entered herein on October 8, 1954 be, and it hereby is in all respects denied but without prejudice to a further application by said claimant in the event appropriate stipulations are filed bringing the total amount of claims filed herein within the amounts of the respective interim stipulations heretofore filed herein on behalf of the Tug Eastern Cities and the Barge LTC No. 38".

A copy of said order, attached hereto, is marked Exhibit B-1

[fol. 67] The required particulars of the stipulations to

which the Court there referred are found in *Petition of Texas Co.* 2 Cir., 213, Fed. (2) 479, at page 481. On September 23rd, 1955 stipulations have been filed with the Clerk of this Court on behalf of all claimants, including the claimant Lillian M. Henn. Copies thereof are annexed hereto and marked Exhibit C, D, E and F. It will be noted that such stipulations, in compliance with Judge Weinfeld's decision, bring the claims as against each vessel within the amount of its bond. The bond filed on behalf of the tug EASTERN CITIES is in the amount of $118,542.21, while the claims now asserted against her, according to the stipulations, total $109,525. The bond filed on behalf of the barge L. T. C. No. 38 is in the amount of $165,000, while the claims now asserted against her, according to the stipulations, are $159,525. Claimants have all agreed that their claims will never be increased, that they will not enter judgment in any Court in excess of the stipulated amounts and that any claim of *res judicata* relevant to the issue of limited liability, based on a judgment in any other Court, is waived (*Petition of Texas Co.*, supra).

As claimants have now complied with the opinion of Judge Weinfeld, and the order entered thereon on August 10th, 1955, it is respectfully submitted that the restraining order heretofore entered on October 8th, 1954 should be [fol. 68] modified to permit claimant's pending State Court suit in Supreme Court, Ulster County to proceed to judgment.

Frank C. Mason.

Sworn to before me this 23rd day of September 1955.
Gladys A. White.

Gladys A. White, Notary Public, State of New York, No. 43-9641600, Qualified in Richmond County, Cert. filed in New York Co. Clerks, Commission Expires March 30, 1956.

[fols. 69-70] EXHIBIT A. (Order for monition and injunction) Omitted. Printed side page 16 ante.

[fol. 71] EXHIBIT B TO AFFIDAVIT

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Ad. 183-206

IN THE MATTER OF THE PETITION OF LAKE TANKERS CORPORATION, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

OPINION

APPEARANCES:

Burlingham, Hupper & Kennedy, 27 William Street, New York, N. Y., Proctors for Petitioner, Eugene Underwood and H. Barton Williams, Of Counsel.

Rosen & Rosen, 11 Market Street, Poughkeepsie, New York, Proctors for Claimant Lillian M. Henn, Appearing Specially, Paul Rosen and Frank C. Mason, Of Counsel.

EDWARD WEINFELD, D. J.

The claimant moves to modify the restraining order entered in the limitation proceeding so as to permit her to proceed with a suit against petitioner in the New York State Supreme Court commenced in her capacity as Administratrix of the estate of her late husband.

The claim arises out of a collision in the Hudson River between the motor yacht Blackstone, on which deceased was [fol. 72] a passenger, and the tank barge LTC No. 38 then in tow of the tug Eastern Cities. The tug and the barge are owned by the petitioner. The Eastern Cities was push-towing No. 38 up the Hudson River and the yacht was proceeding downstream when the collision occurred. The yacht sank and deceased was drowned. The other passengers aboard the yacht and its owner have also filed claims against the petitioner.

In all there are eleven claimants and their claims aggregate $259,525. The total of two bonds filed in the limitation proceeding is $283,542.21. Accordingly, the claimant-Administratrix, in reliance upon Petition of Texas Co., 2 Cir.,

213 F. 2d 479, and other authorities[1] seeks to lift the restraint.

The petitioner contends that Petition of Texas Co., supra, is inapplicable; that in fact the limitation funds do not exceed the aggregate of all claims filed against it. It urges that in the instant proceeding there is not a single limitation fund of $283,542.21 but on the contrary two separate funds, one for the Eastern Cities in the sum of $118,542.21 and the other for the LTC No. 38 in the amount of $165,000, and that pending a final determination of liability on the part of each vessel, each fund must be treated separately and so treated clearly the eleven claims exceed each fund and so must be brought into concourse. [fol. 73] The facts which led up to the filing of the separate ad interim stipulations are as follows: In September, 1954 claimant as Administratrix commenced her action in the State Supreme Court, Ulster County, to recover damages for the wrongful death of decedent. The complaint charged that the Lake Tankers Corporation as owner of both the barge and tug, was negligent and contributed to the death of decedent. The owner of the yacht Blackstone, was also named as a defendant in the action and charged with negligence in its operation.

Thereafter the petitioner filed the limitation proceeding as owner of both the tug and barge but gave an ad interim stipulation only for the value of its interest in the tug Eastern Cities and pending freight in the sum of $118,542.21. The usual restraining order issued but was not limited to the tug Eastern Cities. The restraint also enjoined prosecution of claimant's state court action against petitioner with respect to the barge as well. The petition alleged that the barge was without motive power, that both vessels were seaworthy; that both were exhibiting regulation lights. The claimant in filing exceptions to the petition disputed these allegations and contended, amongst other matters, that one of the issues to be determined upon a trial was the lack of navigation lights upon the barge.

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[1] Curtis Bay Towing v. Tug Kevin Moran, Inc., 2 Cir., 159 F. 2d 273; Petition of Poling Holding Corp., S. D. N. Y., 120 F. Supp. 890; In re Trawler Gudrum, Inc., D. Mass., 101 F. Supp. 586.

She then moved to dismiss the petition on the ground that although petitioner sought exoneration from, or in the alternative limitation of, liability it had failed as owner of the barge to offer an ad interim stipulation for [fol. 74] its interest in the barge and her pending freight and had failed to surrender or offer to surrender the vessels as required by the statute. Judge Ryan sustained the exception to the extent of providing that in the event the petitioner filed a bond for the value of the barge the restraining order would remain in force; and failing which the restraint would be modified so as to continue in effect only with respect to suits against the tug Eastern Cities.

The petitioner then filed a second bond in the sum of $165,000 representing the value of its interest in the barge, which led to the filing of the present motion.

The basis of claimant's contention that both bonds must be totalled is that when two or more vessels of the same owner contribute to a disaster the owner may not limit liability without surrendering his interest in all vessels.[2] While this is so, and the bond to cover the barge was ordered by Judge Ryan to meet this contingency, vessels in single ownership engaged in a common enterprise, absent a claim based on a contractual relationship,[3] may not be treated as a unit until it is determined whether each is personally at fault, in rem. Up to that time each must be deemed an independent entity, and upon being charged with fault is subject to surrender as such, and in any limitation proceeding a separate stipulation is required [fol. 75] "as a substitute for the vessel itself."[4] Liability is governed by the individual wrongdoing of each vessel involved and a petitioner may only be called upon to surrender such vessels as are found at fault.[5]

Thus in the instant case, while it is true liability is

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[2] United States v. The Australia Star, 2 Cir., 172 F. 2d 472, 478.

[3] Sacramento Nav. Co. v. Salz, 273 U. S. 326; Standard Dredging Company v. Kristansen, 2 Cir., 67 F. 2d 548.

[4] Hartford Accident Co. v. Sou. Pacific, 273 U. S. 207, 220.

[5] Liverpool &c. Nav. Co. v. Brooklyn Term'l, 251 U. S. 48; The Transfer No. 21, 2 Cir., 248 Fed. 459.

charged against the barge, which was without motive power, as well as the tug, it may eventuate that only the tug will be found liable, in which event the bond posted for the barge could not be availed of. In such circumstance the claimants would have recourse only to the bond of $118,542.21 posted for the tug, a sum far below the total of the pending claims of $259,525, indicating the need for a concourse of claims to enforce an equitable pro rata distribution of the fund.[6] Parenthetically it is noted that the ad interim stipulation, while based on affidavits of petitioner's own appraisers, does not necessarily determine the value of petitioner's interest in the tug which may eventually be found to be more or less than the amount of the stipulation.

Particularly appropriate is the holding in Harbor Towing Corp. v. Atlantic Mutual Insurance Company, 4 Cir., 189 F. 2d 409, where the court said: "It is true that the tug and tow were operating as a unit at the time of the collision in the instant case and that such a flotilla may be [fol. 76] considered a single vessel for many purposes, including limitation of liability * * * but as to third persons the liability of tug and tow depend upon their individual wrongdoing, and in case of collision with a third ship, the value of the guilty vessel alone is the limit of the owner's liability.

Indeed, it is significant that Judge Ryan's order provided that if a bond were not posted for the barge it would not effect the restraining order previously issued with respect to claims against the tug but would permit claimants to proceed with their suits against the barge.

Just as the owner's allegation that the barge was free from fault did not dispense with requiring it to post a bond or to surrender the barge to obtain the benefit of the Limitation Act, so the mere allegation by the claimant that the barge is at fault does not establish the fact so as to require at this time that it and the tug be considered a

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[6] Curtis Bay Towing Co. v. Tug Kevin Moran, 2 Cir., 159 F. 2d 273; Rice Growers Ass'n. v. Rederiaktiebolaget Erode, 9 Cir., 171 F. 2d 662; Petition of Tracy, E. D. N. Y., 86 F. Supp. 306.

single vessel. Whether it was an offending vessel can only be determined after a trial of the contested issue.

The cases relied upon by libellant to treat the vessels at this time as a single unit so as to permit considering the bonds as one are inapposite.[7] In all instances they were so regarded only after a determination which fixed liabil- [fol. 77] ity with respect to each vessel or else involved contractual relationships.

The motion is denied but without prejudice to a further application by the claimant in the event appropriate stipulations are filed bringing the claims as against each vessel within the amount of its bond.

Settle order on notice.

Edward Weinfeld, United States District Judge.

July 14, 1955.

[fols. 78-79] Exhibit B-1 (Order denying motion to vacate the restraining order, etc.) omitted. Printed side page 54, ante.

[fols. 80-82] Exhibit C (Stipulation of claimant Lillian M. Henn) omitted. Printed side page 58, ante.

[7] United States v. The Australia Star, 2 Cir., 172 F. 2d 472; Sabine Towing Co. v. Brennan, 5 Cir., 72 F. 2d 490; The Bowling Green, E. D. N. Y., 11 F. Supp. 109; The Bordentown, S. D. N. Y., 40 Fed. 682.

[fol. 83] EXHIBIT D TO AFFIDAVIT

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A 183-206

In the Matter of the Petition of LAKE TANKERS CORPORATION, for exoneration from or limitation of liability

The undersigned, claimants in the above entitled limitation proceedings, who have, by their proctor Michael Nardone, filed claims herein in the following amounts:

Charles Carlson	$3,000.00
Clyde W. Roan	4,400.00

hereby stipulates, with respect to the ad interim stipulation for value filed by petition on behalf of the tug EASTERN CITIES in the sum of $118,542.21 and the ad interim stipulation for value filed by said petitioner on behalf of the barge L. T. C. No. 38 in the amount of $165,000:

1. That they will not increase the amount of each of their said claims as against either of the said vessels or the petitioner and stipulators for value, at any future date beyond the amounts above stated.

2. That they will not enter judgment in any Court in excess of the stipulated amounts of their claims against petitioner as owner of either of said vessels.

3. That they hereby waive any claim of *res judicata* relevant to the issue of limited liability with respect to either [fol. 84] of said vessels, based on a judgment in any other Court.

Michael Nardone (Signed), Charles Carlson (Signed), Clyde W. Roan (Signed).

[fol. 85] *Duly sworn to by Charles Carlson and Clyde W. Roan. Jurat omitted in printing.*

[fol. 86] EXHIBIT E TO AFFIDAVIT

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Petition of LAKE TANKERS CORPORATION, for exoneration from or limitation of liability

The undersigned, proctor for claimant John Strong in the above entitled limitation proceedings and who has filed claim herein on his behalf in the amount of $1,600.00 hereby stipulates with respect to the ad interim stipulation for value filed by petitioner on behalf of the tug EASTERN CITIES in the sum of $118,542.21 and the ad interim stipulation for value filed by said petitioner on behalf of the barge L. T. C. No. 38 in the amount of $165,000:

1. That said claimant will not increase the amount of his said claim as against either of the said vessels or the petitioner and stipulators for value, at any future date beyond the amount above stated.

2. That he will not enter judgment in any Court in excess of the stipulated amount of his claim against petitioner as owner of either of said vessels.

3. That he hereby waives any claims of *res judicata* relevant to the issue of limited liability with respect to either of said vessels, based on a judgment in any other Court.

[fol. 87] Said proctor further represents to the Court that he is authorized to execute this stipulation on behalf of claimant, John Strong, who at this time is absent from the jurisdiction of the Court and the place where proctor has and maintains his office.

Michael Nardone (Signed), Proctor for Claimant, John Strong.

September 20, 1955.

[fol. 88] EXHIBIT F TO AFFIDAVIT

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A 183-206

In the Matter of the Petition of LAKE TANKERS CORPORATION, for exoneration from or limitation of liability

The undersigned, proctor for the below named claimants in the above entitled limitation proceedings and who has filed claims on their behalves in the following amounts:

John W. Van Wart	$ 50.00
William F. Hughes	50.00
Robert D. McNutt	50.00
Albert H. Raymond, Jr.	50.00
Robert E. Cruz	225.00
Ernest Cady	50.00
William B. Ratledge, Jr.	50.00

hereby stipulates, with respect to the ad interim stipulation for value filed by petitioner on behalf of the tug EASTERN CITIES in the sum of $118,542.21 and the ad interim stipulation for value filed by said petitioner on behalf of the barge L. T. C. No. 38 in the amount of $165,000 that:

1. Said claimants will not increase the amount of each of their said claims as against either of the said vessels or the petitioner and stipulators for value, at any future date beyond the amounts above stated.

2. That they will not enter judgment in any Court in excess of the stipulated amounts of their claims against petitioner as owner of either of said vessels.

[fol. 89] 3. That they hereby waive any claim of *res judicata* relevant to the issue of limited liability with respect to either of said vessels, based on a judgment in any other Court.

Said proctor further represents to the Court that he is authorized to execute this stipulation on behalf of the claimants above named, and the amounts of whose claims are not affected by or require change in amount to conform with

the decision of Honorable Edward Weinfeld dated July 14th, 1955 and the order entered thereon on August 10th, 1955.

Joseph Jiudice (Signed), Proctor for Claimants, John W. Van Wart, William F. Hughes, Robert D. McNutt, Albert H. Raymond, Jr., Robert E. Cruz, Ernest Cady and William B. Ratledge, Jr.

[fol. 90] Proofs of service (omitted in printing).

[fol. 91] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF EUGENE UNDERWOOD—Filed December 30, 1955

STATE OF NEW YORK,
County of New York, ss.:

Eugene Underwood, being duly sworn, deposes and says:

I am a member of the firm of Burlingham, Hupper & Kennedy, proctors for petitioner herein, and thoroughly familiar with all the proceedings heretofore had herein. This affidavit is made in opposition to motion made by notice dated September 23, 1955, on behalf of claimant Lillian M. Henn for an order vacating the restraining order heretofore entered herein on October 8, 1954.

The predicate of the present motion is that the claims against petitioner herein have by stipulation been reduced to an aggregate less than the limitation fund. This is not the fact; they have not been so reduced. The amounts of the claims of the claimants other than Lillian M. Henn have not been altered. The amount of the Henn claim as against petitioner has not been reduced; it has only been allocated

as between tug and barge. The aggregate of all claims remains as before. The claims are as follows:

[fol. 92] Henn Claim against petitioner:

Throught the tug	$100,000
Through the barge	150,000
The other nine claims	9,525
	$259,525

This total is the same as was the total of all the claims when this matter was before the Court on the previous motion of Lillian M. Henn to vacate the restraining order as to her.

It is notable also that the ad damnum in the State Court action, $500,000, has not been reduced, nor has any offer or stipulation been made to reduce it.

Eugene Underwood.

Sworn to before me this 13th day of October, 1955.

Duly sworn to by Eugene Underwood. Jurat omitted in printing.

[fol. 93] [File endorsement omitted.]

In United States District Court, Southern District of New York

Ad. 183-206

In the Matter of the Petition of Lake Tankers Corporation for Exoneration From or Limitation of Liability

Supplemental Memorandum Decision—December 30, 1955

Edward Weinfeld, D. J.

Since the determination of the above matter the Court of Appeals decision in In the Matter of Trinidad Corp., Docket

No. 23478, decided December 28, 1955, has come to my attention. In my view this decision, wherein the Court of Appeals reiterates its holding in Petition of Texas Co., 2 Cir., 213 F. 2d 479, also supports the disposition made in the instant matter. However, proctors in presenting a proposed order shall in addition to the usual stipulations make the granting of the order conditional upon filing the further stipulations suggested in In the Matter of Trinidad Corp.

Edward Weinfeld, United States District Judge.

December 30, 1955.

[fol. 94] [File endorsement omitted.]

In United States District Court, Southern District of New York

* * * * * * *

Order Vacating Restraining Order—January 16, 1956

Claimant, Lillian M. Henn, Administratrix of the Estate of Robert C. Henn, deceased, by notice of motion dated September 23rd, 1955, having moved for an order vacating the restraining order entered herein on October 8th, 1954 with respect to the action pending in the Supreme Court of the State of New York, Ulster County, brought by said claimant against the petitioner herein; and said motion having regularly come on to be heard at a Term of this Court for the hearing of motions, and Frank C. Mason, Esq. having appeared of counsel in support of the motion and Eugene Underwood, Esq. of counsel for petitioner, having appeared in opposition thereto, and the Court after due deliberation having filed its opinion on December 30th, 1955, granting the said motion and the Court, thereafter, having filed its memorandum decision on December 30th, 1955, by which it instructed proctors with respect to the form of the order to be entered upon such motion;

Now, on the notice of motion dated September 23rd, 1955, the affidavit of Frank C. Mason, Esq. sworn to Sep-

tember 23rd, 1955, the affidavit of Eugene Underwood, Esq., sworn to October 13th, 1955, on the opinion of this Court filed herein on December 29th, 1955, and on its supplemental memorandum filed herein on December 30th, [fol. 95] 1955 and the claimant having offered her formal stipulation and partial release in favor of petitioner, acknowledged before a Notary Public, and dated January 7th, 1956, in compliance with the Court's supplemental memorandum of instructions, filed December 30th, 1955, the original of which stipulation and partial release is annexed hereto, it is, by the Court,

Ordered that the motion of Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn, deceased, for an order vacating the restraining order entered herein on October 8th, 1954 with respect to her suit pending in the Supreme Court, State of New York, Ulster County, be and the same hereby is in all respects granted subject, however, to the following conditions:

1. that claimant shall be permitted to prosecute her suit in Supreme Court, State of New York, Ulster County only to judgment;

2. that the injunction of October 8th, 1954, insofar as it enjoins collection of the judgment elsewhere than in this proceeding, shall be continued;

3. that the Court expressly reserves jurisdiction to reestablish a concourse and to adjudicate the petitioner's right to a limitation in the event that the funds should ultimately prove to be inadequate;

4. that in no event shall this claimant recover from the fund an amount in excess of her claim as reduced by the partial releases heretofore given until all other claims have been satisfied in full;

5. that the Court further retains jurisdiction of this proceeding against the event that petitioner's right to limit liability of either the tug EASTERN CITIES or [fol. 96] barge L. T. C. No. 38 should be questioned in any other forum.

Edward Weinfeld, U. S. D. J.

Dated New York, N. Y., January 16th, 1956.

[fol. 97] [Title omitted]

STIPULATION AND PARTIAL RELEASE—January 7, 1956

Claimant, Lillian M. Henn, as Administratrix of the goods, chattels and credits of Robert C. Henn, deceased, who by her proctors, Rosen & Rosen, has heretofore filed a claim in this proceeding in the amount of $250,000 hereby stipulates and represents to the Court and to the petitioner as follows:

1. She reiterates and affirms the terms of the written stipulation, heretofore executed by her on September 6th, 1955, duly acknowledged before a Notary Public of the State of New York, Dutchess County, and filed herein on September 23rd, 1955, providing:

(a) that her claim as against the tug EASTERN CITIES, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulat*ros* for value is reduced to the sum of $100,000;

(b) that her claim as against the barge L. T. C. No. 38, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is reduced to the sum of $150,000;

(c) that she will not increase the amount of either of said claims as against either of the said vessels, as above stated, or the petitioner and its stipulators for value at any future date beyond the amounts so stated;

[fol. 98] (d) that she will not enter judgment in any Court in excess of the stipulated amounts of her claims against petitioner as owner of either of said vessels;

(e) that she hereby waives any claim of *res judicata* relevant to the issue of limited liability with respect to either of said vessels, based on a judgment in any other Court.

2. As her unconditional partial release she represents:

(a) that the total amount of all claims filed herein as against the tug EASTERN CITIES and the petitioner, as her owner, is $109,525; the total amount of all

claims filed herein as against the barge L. T. C. No. 38 and the petitioner, as her owner, is $159,525;

(b) that in consideration of the entry of an order upon this stipulation, pursuant to the decisions of Honorable Edward Weinfeld, United States District Judge, dated December 29th and 30th, 1955, modifying the injunctive order entered herein October 8th, 1954, to permit the prosecution of her suit in Supreme Court, State of New York, Ulster County, she hereby releases and forever discharges the petitioner, its successors and assigns and the tug EASTERN CITIES and the barge L. T. C. No. 38 unconditionally but partially to the extent hereinafter described from all causes of action whatsoever, in law, in admiralty, or in equity which against them she ever had, now has or which her successors hereafter shall or may have by reason of the death of Robert C. Henn on July 10th, 1954, resulting from a collision between the motor yacht BLACKSTONE, on which he was a passenger, with the barge L. T. C. No. 38 in tow of the tug EASTERN CITIES, in the Hudson River; it being the intent and purpose of this release that it be partial to the extent of the difference between the amount of her claim originally [fol. 99] filed herein in the sum of $250,000 and the reduced amount of her claim heretofore stipulated as against the tug EASTERN CITIES of $100,000, so that the amount hereby released as to such tug and the petitioner is $150,000; and it being the further intent and purpose of this release that it be partial to the extent of the difference between the amount of her claim originally filed herein in the sum of $250,000 and the reduced amount of her claim heretofore stipulated as against the barge L. T. C. No. 38 of $150,000, so that the amount hereby released as to such barge and the petitioner is $100,000.

3. She consents to, and hereby authorizes her proctors, Rosen & Rosen, to submit an order to the Court for entry and providing:

(a) that she shall be permitted to prosecute her suit in Supreme Court, State of New York, Ulster County only to judgment;

(b) that the injunction of October 8th, 1954, insofar as it enjoins collection of the judgment elsewhere than in this proceeding, shall be continued;

(c) that the Court expressly reserves jurisdiction to reestablish a concourse and to adjudicate the petitioner's right to a limitation in the event that the funds should ultimately prove to be inadequate;

(d) that in no event shall this claimant recover from the fund an amount in excess of her claim as reduced by the partial releases heretofore given until all other claims have been satisfied in full;

(e) that the Court further retains jurisdiction of this proceeding against the event that petitioner's right to limit liability of either the tug EASTERN CITIES or barge L. T. C. No. 38 should be questioned in any other forum.

[fol. 100] In witness whereof, I have hereunto set my hand and seal, as the Administratrix of the Estate of Robert C. Henn, deceased, the 7th day of January in the year One Thousand Nine Hundred and Fifty-six.

Lillian M. Henn, L. S., Administratrix of the Estate of Robert C. Henn, deceased.

[fol. 101] *Duly sworn to by Lillian M. Henn. Jurat omitted in printing.*

[fol. 102] Proofs of service (omitted in printing).

[fol. 103] In United States Court of Appeals for the Second Circuit, October Term, 1955

No. 268

(Argued February 17, 1956)

Docket No. 23965

In the Matter of the Petition of Lake Tankers Corporation for Exoneration from or Limitation of Liability

Before: Clark, Frank and Hincks, *Circuit Judges*.

Appeal from an order of the United States District Court for the Southern District of New York, entered by Judge Weinfeld. Modified and Affirmed as modified.

Burlingham, Hupper & Kennedy (New York, New York), Proctors for Petitioner. Rosen & Rosen, Proctors for Claimant-Appellee.

Opinion—April 13, 1956

On July 10, 1954 the yacht Blackstone was proceeding down the Hudson River. Petitioner's tug, Eastern Cities, push-towing petitioner's barge L. T. C. No. 38, was proceeding up the river. The Blackstone ran into the bow of L. T. C. No. 38 and capsized. Ten of the eleven persons [fol. 104] aboard the Blackstone were rescued by the Eastern Cities, but appellee's decedent was drowned. Appellee began an action in the New York Supreme Court, Ulster County, against petitioner to recover $500,000 damages for the loss of her husband's life, alleging negligence on petitioner's part in respect of its operation of both the tug and the barge. Four other actions by survivors were begun in the State Court, alleging damages aggregating $157,000. On October 6, 1954, petitioner filed, in the court below, a petition for its exoneration from or limitation of liability. The petition alleged that the collision occurred without fault on the part of any of petitioner's servants and that petitioner was entitled to exoneration; it also alleged that the collision occurred without petitioner's privity or knowledge and that, if liable, petitioner was entitled to limit its

liability to the value of its interest in both vessels. However, bond was given for $118,542.21, representing only the value of petitioner's interest in tug Eastern Cities and her pending freight. On October 8, 1954, the usual restraining order was issued, enjoining the beginning or prosecution of claims against petitioner except in the limitation proceeding; that order was not limited to the tug.

Appellee appeared specially and moved to dismiss the petition and to vacate the restraining order, on the ground that the bond failed to include the value of petitioner's interest in barge L. T. C. No. 38. This motion was denied by Judge Ryan, who continued the restraining order in force, conditioned, however, upon petitioner's filing an additional bond for the value of its interest in the barge, failing which the restraint would be modified so as to continue in effect only as to suits against petitioner as owner of the tug. Petitioner then filed an additional bond for the barge in the sum of $165,000. Appellee thereupon filed in the limitation proceeding, her claim for $250,000. Other [fol. 107] claims, aggregating $9,525 were filed on behalf of the ten rescued survivors.

Appellee then moved before Judge Weinfeld to vacate the restraining order as to her state court suit, on the theory that, since the total security on behalf of the tug and barge amounted to $283,542.21 and the claims totalled $259,525, upon the filing of appropriate stipulations in accordance with this Court's decision in *Petition of Texas Co.*, 213 F. 2nd 479, the restraint should be lifted. Judge Weinfeld denied that motion (in an opinion reported in 132 F. Supp. 504) without prejudice to a further application by appellee in the event appropriate stipulations were filed bringing all claims against petitioner as to each vessel within the amount of the bond as to such vessel. On September 23, 1955 the ten claimants, other than appellee, filed the usual stipulations agreeing not to increase the amounts of their claims as made, nor to enter judgments in excess of the stipulated amounts and waiving any claim of *res judicata* relative to the issue of limited liability with respect to either of the vessels. On the same day appellee filed a stipulation reducing her claim against petitioner as to the tug Eastern Cities to $100,000 and as to the barge to $150,000. She also agreed not to increase the amount of

either of said claims as to either of the vessels, or to enter judgment in excess of the stipulated amounts of her claims against petitioner as owner of either of them, and she waived any claim of *res judicata* relative to the issue of limited liability in respect of either of the vessels.

Appellee again moved for modification of the restraining order. Judge Weinfeld wrote an opinion granting the motion, and, on January 17, 1956 entered an order to that effect. His order was explicitly based on appellee's stipulation (including partial releases, to which she had sworn before a notary public). In the stipulation and partial [fol. 106] releases, she agreed to reduce her claim against petitioner (1) as to the tug to $100,000 and (2) as to the barge to $150,000. The other ten claims totalled $9,525.

In his opinion, Judge Weinfeld said in part: "In addition to the moving claimant there are ten others and the eleven claims constitute all possible claims which could be filed in this proceeding as a result of the disaster and the time to file has expired. The bond filed on behalf of the tug Eastern Cities is in the sum of $118,542.21, while the claims asserted against her under the stipulations filed by the claimants are limited to $109,525; the bond filed on behalf of the barge L. T. C. No. 38 is in the sum of $165,000, while the claims asserted against her under the stipulations filed by claimants are limited to $159,525. * * * There are now two separate funds, one for the tug and one for the barge. Each limitation fund is clearly in excess of the total sum of the claims asserted as against each vessel. A special verdict may be applied for which would spell out the precise liability that may be imposed with respect to each vessel. It is not to be presumed that the state court will deny an appropriate application for a special verdict. Thus in the event, under a special verdict, there is a finding of negligence in the operation of the tug and not of the barge, the moving claimant's recovery, under her stipulation, could not exceed the amount of her reduced claim. Accordingly, the total of her judgment and the remaining claims would be limited to the bond posted for the tug, which would preclude resort to the bond posted for the barge. And alternatively if liability were established solely because of the negligent operation of the barge, no recourse could be had as against the bond posted for the tug. Of course if

liability should be found with respect to both the tug and barge, a different situation would prevail. Since petitioner as shipowner is fully protected in the limitation of liability as to each vessel, there is no sound reason why claimant [fol. 107] should not be permitted to proceed with her action in the state court—the forum of her choice."

In the Appendix to this court's opinion are set forth pertinent parts of Judge Weinfeld's order and of appellee's stipulation (including her partial releases). From Judge Weinfeld's order, petitioner has appealed.

FRANK, *Circuit Judge:*

In *Petition of Texas Co.*, 213 F. 2nd 479, 482 (C. A. 2), we stated, as follows, the principles applicable here, in accordance with our previous decisions: "Absent an insufficient fund, (1) the statutory privilege of limiting liability is not in the nature of a *forum non conveniens* doctrine, and (2) the statute gives a ship-owner, sued in several suits (even if in divers places) by divers persons, no advantage over other kinds of defendants in the same position. Concourse is to be granted 'only when * * * necessary in order to distribute an inadequate fund.'[1] The purpose of limitation proceedings is not to prevent a multiplicity of suits, but in equitable fashion, to provide a marshalling of assets—the distribution pro rata of an inadequate fund among claimants, none of whom can be paid in full."[2] We quoted the provisions of 46 U. S. C. A. Section 184 that, when loss is suffered by several persons, "and the whole vessel and her freight for the voyage, *is not sufficient to make compensation to each of them,* they shall receive compensation * * * *in proportion to their respective losses,*" and that the limitation proceedings are

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[1] Here we cited *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.*, 159 F. 2nd 273, 276 (C. A. 2).

[2] Here we cited *Petition of Moran Transportation Corp.*, 185 F. 2nd 386, 388-389 (C. A. 2); *Petition of Red Star Barge Line, Inc.*, 160 F. 2nd 436 (C. A. 2); *The Aquitania*, 14 F. 2nd 456, 458, affirmed 20 F. 2nd 457 (C. A. 2).

"for the *purpose of apportioning the sum* * * * among the [fol. 108] parties entitled thereto." Subsequently, we said the same in *Matter of Trinidad Corp.*, —— F. 2nd —— (C. A. 2, December 28, 1955) and in *George J. Waldie Towing Co. v. Ricca*, 227 F. 2nd 900, 901 (C. A. 2).

Section 184 covers the liability of "the owner" of "the vessel." In the case at bar, it happens that petitioner owns two vessels, and may be liable for the conduct of either vessel or both. Had each vessel been owned by a separate owner, each owner could have instituted a limitation proceeding. So the owner here could have instituted one such proceeding to limit its liability as tug-owner to the value of the tug, and another proceeding as barge-owner to limit its liability to the value of the barge. The owner cannot enlarge its rights under the statute by the mere expedient of coupling the two proceedings.

Accordingly, we must regard this case just as if it comprised two separate limitation proceedings. On that basis, we affirm. For, in respect of petitioner's liability as owner of each vessel, the order and appellee's stipulation (including her partial releases) comply with what we required in the *Trinidad* case. We interpret the order, the stipulation, and the partial releases, to relate to the liability of petitioner *in personam* as the owner of each vessel separately. All the claims against petitioner as the tug's owner come to $109,525, an amount less than the bond of $118,542.21 as to petitioner's liability as owner of that vessel; all the claims against petitioner as the barge's owner come to $159,525, an amount less than the bond of $165,000 as petitioner as owner of that vessel. Consequently, there was not an insufficient fund in respect of petitioner's liability either as owner of the tug or as owner of the barge.

As Judge Weinfeld said, a special verdict in the state court suit will decide whether petitioner is liable for the conduct of either or neither vessel, or both vessels. That suit will not interfere with the exclusive admiralty juris- [fol. 108a] diction of the court below affecting the limitation of liability: (a) No judgement of the state court can operate *in rem*. (b) Appellee's stipulation (which includes a waiver of any claim of *res judicata* relevant to the issue of limited liability of petitioner as owner of either the tug or

the barge) and her partial releases, together with the reserved jurisdiction of the district court, prevent any effective determination by the state court of the value of either vessel.

We think, however, Judge Weinfeld's order should be amended to include the following: "If claimant obtains a judgment in her state court suit for an amount in excess of $100,000, an injunction will issue permanently enjoining her from collecting such excess unless the judgment rests on a special verdict allocating the amount as between the libelant as owner of the tug and as owner of the barge respectively. Thus if the judgment exceeds $100,000 and the jury finds libelant liable solely as owner of the tug, she will be enjoined from collecting any excess. If the jury finds that the libelant is liable solely as owner of the barge, she will be enjoined from collecting any amount in excess of $150,000."

The other claimants are apparently content to proceed for a determination of their claims in the limitation proceeding.[3] It is possible that the court below, in passing on their claims, may adjudge the petitioner not liable, while the state court in appellee's suit may adjudge otherwise. But such an eventuality will present no difficulty. For the adjudication in the limitation proceeding concerning liability or non-liability to the other claimants will not serve as *res judicata* or estoppel by verdict for or against ap- [fol. 109] pellee in her state court suit, nor will the adjudication concerning liability or non-liability in appellee's state court suit have such an effect for or against the other claimants in the limitation proceeding.

Modified and affirmed as modified.

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[3] Petitioner suggests that perhaps the other claimants may seek to proceed elsewhere. The resultant problem cannot arise unless and until they file appropriate stipulations and partial releases. Moreover, an application to relax the restraining order as to them must be made seasonably, as we said in *Trinidad*; and the limitation proceeding was instituted a year and four months ago.

Judge Weinfeld's order of January 17, 1956 reads, in part, as follows:

"Ordered that the motion of Lillian M. Henn * * * for an order vacating the restraining order entered herein on October 8th, 1954 with respect to her suit pending in the Supreme Court, State of New York, Ulster County, be and the same hereby is in all respects granted subject, however, to the following conditions:

1. that claimant shall be permitted to prosecute her suit in Supreme Court, State of New York, Ulster County only to judgment;

2. that the injunction of October 8th, 1954, insofar as it enjoins collection of the judgment elsewhere than in this proceeding, shall be continued;

3. that the Court expressly reserves jurisdiction to reestablish a concourse and to adjudicate the petitioner's right to a limitation in the event that the funds should ultimately prove to be inadequate;

4. that in no event shall this claimant recover from the fund an amount in excess of her claim as reduced by the partial releases heretofore given until all other claims have been satisfied in full;

5. that the Court further retains jurisdiction of this proceeding against the event that petitioner's right to [fol. 110] limit liability of either the tug Eastern Cities or barge L. T. C. No. 38 should be questioned in any other forum."

Appellee's stipulation and partial releases read, in part, as follows:

"1. She reiterates and affirms the terms of the written stipulation, heretofore executed by her on September 6th, 1955, duly acknowledged before a Notary Public of the State of New York, Dutchess County, and filed herein on September 23rd, 1955, providing:

(a) that her claim as against the tug Eastern Cities, the ad interim stipulation for value filed on its behalf,

the petitioner and its stipulators for value is reduced to the sum of $100,000;

(b) that her claim as against the barge L. T. C. No. 38, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is reduced to the sum of $150,000;

(c) that she will not increase the amount of either of said claims as against either of the said vessels, as above stated, or the petitioner and its stipulators for value at any future date beyond the amounts so stated;

(d) that she will not enter judgment in any Court in excess of the stipulated amounts of her claims against petitioner as owner of either of said vessels;

(e) that she hereby waives any claim of res judicata relevant to the issue of limited liability with respect to either of said vessels, based on a judgment in any other Court.

[fol. 111] 2. As her unconditional partial release she represents:

(a) that the total amount of all claims filed herein as against the tug Eastern Cities and the petitioner, as her owner, is $109,525; the total amount of all claims filed herein as against the barge L. T. C. No. 38 and the petitioner, as her owner, is $159,525;

(b) that in consideration of the entry of an order upon this stipulation, pursuant to the decisions of Honorable Edward Weinfeld, United States District Judge, dated December 29th and 30th, 1955, modifying the injunctive order entered herein October 8th, 1954, to permit the prosecution of her suit in Supreme Court, State of New York, Ulster County, she hereby releases and forever discharges the petitioner, its successors and assigns and the tug Eastern Cities and the barge L. T. C. No. 38 unconditionally but partially to the extent hereinafter described from all causes of action whatsoever, in law, in admiralty or in equity which against them she ever had, now has or which her successors hereafter shall or may have by reason of the death of Robert C. Henn on July 10th, 1954,

resulting from a collision between the motor yacht Blackstone, on which he was a passenger, with the barge L. T. C. No. 38 in tow of the tug Eastern Cities, in the Hudson River; it being the intent and purpose of this release that it be partial to the extent of the difference between the amount of her claim originally filed herein in the sum of $250,000 and the reduced amount of her claim heretofore, stipulated as against the tug Eastern Cities of $100,000, so that the amount hereby released as to such tug and the petitioner is $150,000; and it being the further intent and purpose of this release that it be partial to the extent of the [fol. 112] difference between the amount of her claim originally filed herein in the sum of $250,000 and the reduced amount of her claim heretofore stipulated as against the barge L. T. C. No. 38 of $150,000, so that the amount hereby released as to such barge and the petitioner is $100,000.

3. She consents to, and hereby authorizes her proctors, Rosen & Rosen, to submit an order to the Court for entry and providing:

(a) that she shall be permitted to prosecute her suit in Supreme Court, State of New York, Ulster County only to judgment;

(b) that the injunction of October 8th, 1954, insofar as it enjoins collection of the judgment elsewhere than in this proceeding, shall be continued;

(c) that the Court expressly reserves jurisdiction to reestablish a concourse and to adjudicate the petitioner's right to a limitation in the event that the funds should ultimately prove to be inadequate;

(d) that in no event shall this claimant recover from the fund an amount in excess of her claim as reduced by the partial releases heretofore given until all other claims have been satisfied in full;

(e) that the Court further retains jurisdiction of this proceeding against the event that petitioner's right to limit liability of either the tug Eastern Cities or barge L. T. C. No. 38 should be questioned in any other forum.

In witness whereof, I have hereunto set my hand and seal, as the Administratrix of the Estate of Robert C. [fol. 113] Henn, deceased, the 7th day of January in the year One Thousand Nine Hundred and Fifty-six.

Lillian M. Henn, L. S., Administratrix of the Estate of Robert C. Henn, deceased.

(Verified on January 7, 1956, by Lillian M. Henn, as claimant.)"

HINCKS, *Circuit Judge* (dissenting):

My brothers say: "We must regard this case just as if it comprised two separate limitation proceedings. On that basis, we affirm." Even if I agreed that this treatment of the situation is correct, I should still be constrained to dissent. For on that basis, in the tug proceeding the claimant's claim is for damages caused by the tug in the amount as reduced by stipulation, of $100,000, and the owner's liability depends on the fault of the tug; in the barge proceeding the claim is for damages caused by the barge in the reduced amount of $150,000, and the owner's liability depends on the fault of the barge.

Such being the situation, suppose the state court on a general verdict enters judgment in favor of the claimant in excess of $100,000. What possible effect can such a judgment have? It appears to me that it would be wholly uncollectible in either limitation proceeding. Under the amendment of the order below required by the court's opinion, the claimant will be enjoined "from collecting such excess." Under an original provision of the order, the claimant is enjoined from all collection "of the judgment elsewhere than in this [the limitation] proceeding." The general judgment will not be *res judicata* on the issue of liability in the tug proceedings; it does not import a [fol. 114] finding of fault by the tug. Likewise, in the barge proceedings; it does not import a finding of fault in the barge. Thus, notwithstanding the judgment, the issue of liability will be open in both proceedings.

Or suppose that in the state court the claimant obtains a judgment on a general verdict in an amount say of

$5000 and being disappointed in the amount thereof decides to press her claims in the limitation proceedings. On no theory of *res judicata* or collateral estoppel can the owner use the state court judgment as decisive on the issues. It will not bar prosecution of the claim in the tug proceedings, because it did not adjudicate that the tug was not at fault. And so in the barge proceedings. The limitation court, perhaps after all the other claims have been heard and adjudicated, will have to hold a full-fledged trial for its determination of the claimant's claim, with a result which may or may not be more satisfactory to the claimant.

Thus considered, the disposition of the court, in my view, subjects the parties to the labor and expense of litigation which well may prove to be wholly fruitless and nugatory.

That such may prove to be the result, I think more than a remote possibility. For that result will follow unless in the state court trial the judge shall require the jury to find specially whether the plaintiff's injury (if caused by the owner's negligence) was caused by negligence in its conduct of the tug or by negligence in the barge. Without special findings, it would be necessary for the jury to determine only whether a proved act of negligence caused the plaintiff's injury. The requirement of special findings will require the jury to determine also whether a proved act of negligence was part of the conduct of a particular vessel,—a determination which under the evidence may involve confusion and difficulty. The plaintiff might prove [fol. 115] an act of negligence and yet fail to prove that the act was a part of the owner's conduct of a particular vessel. In my opinion, it is by no means unlikely that the judge would refuse a request to require special findings on the ground that the request if granted would inject into the case an additional issue the solution of which is not essential to the decision of the case under the law of the state. It may also be observed that if a special verdict were required and claims of error should be predicated on the disposition of that additional issue, the parties would be without the usual remedy by motion or appeal. For it is hardly to be supposed that the trial court or an appellate court would give relief for an error pertaining to an issue

which under the law of the state did not affect the validity of the judgment.

My brothers cite our former decisions in *Texas; Trinidad* and other cases for the proposition that a claimant's choice of forum should be protected and that the Limitation Act does not entitle an owner to a determination in the limitation proceedings of its liability to a multiplicity of claimants growing out of a multiple tort except in cases in which by reason of an inadequate fund a concursus is required. But these cases went no further than to permit litigation at law which would be dispositive,—not litigation which may prove to be nugatory. I think it an unwarranted and undesirable extension of the *Texas* doctrine to sanction procedure whereby two trials, one at law and the other in the limitation proceedings, may be required for a final determination of the issues of a single claim.

I would hold that we have here one proceeding for the limitation of the owner's personal, indivisible, liability to the appellee, among other claimants, on her single indivisible claim. I deprecate sanction for a procedure whereby indivisible causes of actions and indivisible liabilities [fol. 116] may be split and their respective fragments may be litigated in separate proceedings. If, as I think, this is a single limitation proceeding, even though two vessels are involved, the claims concededly exceed the fund which may be fixed, and the *Texas* doctrine is inapplicable.

[fol. 117] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Present: Hon. Charles E. Clark, Chief Judge, Hon. Jerome N. Frank, Hon. Carroll C. Hincks, Circuit Judges.

In the Matter

of

PETITION OF LAKE TANKERS CORP., ETC.

Appeal from the United States District Court for the Southern District of New York.

JUDGMENT—April 13, 1956

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is modified in accordance with the opinion of this Court, and, as modified, said order be and it hereby is affirmed; with costs taxed in favor of the appellee.

A. Daniel Fusaro, Clerk.

[fol. 118] [File endorsement omitted.]

[File endorsement omitted.]

[fol. 119] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM 1955

No. 268

[Title omitted]

PETITION FOR REHEARING—Filed April 27, 1956

Lake Tankers Corporation, appellant, petitioner in this limitation of liability proceeding, respectfully prays for a

rehearing and reargument of this case for the reasons stated below.

With the filing of this petition appellant is also filing a petition praying that this petition for rehearing be heard and considered in banc by all the judges of this Court who are in active service.

Statement of the Case

Petitioner's tug was push-towing petitioner's barge up the Hudson River when the yacht BLACKSTONE with eleven men on board collided with the barge, capsized and sank. [fol. 120] Ten were rescued but the eleventh has not been found. Suit has been brought in the state court against petitioner for $500,000 for the death. Petitioner began this limitation proceeding and eleven claims were filed which aggregate $259,500. Bond was given for the tug in the amount of $118,500 and, later, for the barge in the amount of $165,000. The death claimant, appellee on this appeal, then allocated her claim as between tug and barge, $100,000 to the tug and $150,000 to the barge, the aggregate of all claims remaining, however, at $259,500. Appellee then moved to relax the restraining order, and for leave to proceed with her action in the state court, arguing that after her allocation the claims against the tug are less than her value and the claims against the barge are less than her value. Weinfeld, *J.* granted the motion, petitioner appealed and the panel of this Court that considered the appeal has affirmed, Clark and Frank, *C. JJ.* for affirmance, Hincks, *C. J.* dissenting.

REASONS FOR GRANTING THIS PETITION

I. The decision of the majority of the panel sharply conflicts with the rule as laid down by five other recent decisions of this Court.

Quite recently, after considering the question in at lease five cases, this Court has evolved a rule governing the circumstances under which claimants in a limitation proceeding may obtain leave to pursue their claims outside the limitation proceeding which may fairly be stated as follows:

> Where it is clear that the limitation fund will substantially exceed the aggregate of all possible claims the restraining order will be vacated; otherwise not.

Matter of Trinidad Corporation, 229 F. 2d 423 [Medina and Hincks, *C. JJ.* and Burke, *D. J.*]; *George J. Waldie* [fol. 121] *Towing Co.* v. *Ricca*, 227 F. 2d 909 [Clark, Lumbard and Waterman, *C. JJ.*]; *Petition of Texas Company*, 213 F. 2d 479 [Chase, Swan and Frank, *C. JJ.*]; *Petition of Moran Transp. Corp.*, 185 F. 2d 386 [L. Hand, Swan and Frank, *C. JJ.*]; *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.*, 159 F. 2d 273 [L. Hand, Chase and Frank, *C. JJ.*].

In this proceeding the claims aggregate $259,525 but it cannot be said whether the amount of the limitation fund will be $118,500 or $165,000 or $283,000 until after there has been a trial on the merits. The amount of the fund cannot be determined until after trial on the merits for this reason: Petitioner owned both tug and barge, valued at $118,500 and $165,000 respectively. The limitation fund will consist of the value only of the vessel(s) individually at fault *in rem*. *Liverpool etc. Nav. Co.* v. *Brooklyn Eastern District Terminal*, 251 U. S. 48; *The Transfer No. 21*, 248 Fed. 459 (2 Cir.); *Standard Dredging Co.* v. *Kristiansen*, 67 F. 2d 548 (2 Cir.), certiorari denied 290 U. S. 704; *Harbor Towing Corp.* v. *Atlantic Mutual Ins. Co.*, 189 F. 2d 409 (4 Cir.).

Since the amount of the fund cannot be determined until after trial it is not presently possible to say that the fund will exceed the claims and that no concourse will be necessary to distribute an inadequate fund.

Obviously the decision allowing appellee to proceed in the state court is a complete departure from the recently evolved rule above stated.

It is no answer to say that the claims as against the tug have been reduced to an aggregate less than her value and the claims against the barge similarly reduced. There is no claim pending anywhere against either tug or barge. Neither tug nor barge is before this Court as a juristic person. By apportioning her claim as between tug and barge appellee does no more than engage not to claim the value of the barge if she is held without fault, or the value

[fol. 122] of the tug if she is blameless. But this is no concession whatever because it is settled law that if the barge is not individually at fault *in rem* petitioner need not surrender her value; and similarly as to the tug.

Moreover, appellee's supposed concession has no present effect at all. She presently claims that both tug and barge are at fault and the aggregate of her claims as now pending against petitioner and its property is $250,000. The person against whom the claims are made is the petitioner, Lake Tankers Corporation. Claims asserted to be against its inanimate property, tug and barge, are in truth and in fact claims against petitioner itself, the only juristic person seeking limitation of liability arising out of this collision. The undeniable fact is that, whether allocated to the tug, or the barge, or any other piece of petitioner's property the eleven claims aggregate $259,500. If proved, these will be paid by petitioner out of its general funds in amounts which substantially exceed the amount at which the limitation fund may be fixed.

II. The majority erroneously felt constrained to regard this single proceeding as if it comprised two separate proceedings.

The foundation upon which the decision of the majority rests is that they "must" regard this single proceeding as if it were two (p. 1254). The language of the statute, Title 46 U. S. Code §§ 183-189, does not impose the constraint felt by the majority and the opinion does not rely upon the statute. The same is true of the Supreme Court Rules, Admiralty Rules 51-54, Title 28 U. S. Code, Rules, which spell out the procedure with considerable particularity. The majority opinion does not rely upon the rules.

The decision of the majority is unprecedented. No prior decision imposes the constraint felt by the majority [fol. 123] and it cites none. There are numerous cases in which the courts, including this Court, have dealt with limitation petitions by the owner of two or more vessels without feeling any constraint or embarrassment because separate petitions could have been filed. And this is true both in cases where the value of the second vessel has not been

surrendered originally as well as in cases where security has been given for the second vessel but she has not been held liable. *United States* v. *The Australia Star*, 172 F. 2d 472 (2 Cir.); *Standard Dredging Co.* v. *Kristiansen*, 67 F. 2d 548 (2 Cir.); *The Transfer No. 21*, 248 Fed. 459 (2 Cir.); *The Bordentown*, 40 Fed. 682 (S. D. N. Y.); *The Captain Jack*, 169 Fed. 455 (D. C. Conn.); *The Alvah H. Boushell*, 38 F. 2d 890 (4 Cir.); *Thompson Towing & Wrecking Ass'n* v. *McGregor*, 207 Fed. 209 (6 Cir.); *The Columbia*, 73 Fed. 226 (9 Cir.).

Moreover, where the owner of two vessels has sought to obtain limitation but surrendered the value of only one, and where, after trial, the courts have found that faults of both contributed, they have not, in any instance we can find, directed that a separate proceeding be begun. On the contrary, they have either ordered that the value of the second vessel be brought into the pending, single proceeding, *United States* v. *Australia Star, supra*, 172 F. 2d 472 (2 Cir.); *The Alvah H. Boushell, supra*, 38 F. 2d 890 (4 Cir.), or they have dismissed the proceeding entirely. *The San Rafael*, 141 Fed. 270 (9 Cir.).

The reason advanced by the majority for feeling the constraint upon which its decision is based is that the owner "could have" instituted separate proceedings in respect of each vessel, from which it concludes that "The owner can not enlarge its rights under the statute by the mere expedient of coupling the two proceedings" (p. 1254). The worst that can be said for petitioner's position is that it had the option to begin a single, or two, proceedings. It exercised its option and began one. That was the [fol. 124] exercise of a clear right under the statute and the rules and such advantages as it may gain from the exercise of its right can not justly be taken away. But there is no question of any enlargement of petitioner's rights. It has the unquestioned right under the statute to petition for limitation of liability and it seeks, if held liable at all, only to do what the statute permits it to do in a proper case, viz. limit its liability to the value of its interest in the vessel or vessels at fault. A solution of the problem is not advanced by referring to the filing of a single petition as a "mere expedient".

Without compulsion by statute, rule or precedent, and

with the slenderest of reasons, the majority of the panel has laid down a rule that will largely emasculate the statute where two or more vessels of single ownership are involved. The majority's approach to statutory construction is diametrically contrary to the instructions given by the Supreme Court to the lower courts. Uniformly and over a period of 75 years the Supreme Court has declared that the statute is to be construed liberally and not grudgingly for the benefit of shipowners. *Norwich Company* v. *Wright*, 13 Wall (80 U. S.) 104, 121; *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 588-9; *Butler* v. *Boston and Savannah Steamship Co.*, 130 U. S. 527, 550-1; *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 214-16; *Flink* v. *Paladini*, 279 U. S. 59, 62-3; *Larsen* v. *Northland Transportation Co.*, 292 U. S. 20, 24; *Just* v. *Chambers*, 312 U. S. 383, 385; *Coryell* v. *Phipps*, 317 U. S. 406, 411; *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 414. We submit that the majority has wholly overlooked this guidance from the Supreme Court.

Providence & N. Y. S. S. Co. v. *Hill Mfg. Co.*, 109 U. S. 578, affords a close parallel except that the impetus toward separate proceedings came from the state court. A limitation proceeding was brought in New York but one of the claimants insisted upon proceeding with an action in [fol. 125] Massachusetts and the Massachusetts court sustained its position. The Supreme Court, however, held that the very pendency of the limitation proceeding should have stopped the Massachusetts suit. We urge the Court to read again the entire opinion but the following excerpts are particularly significant:

> "In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations

(as before stated) will be of the *last* importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the shipowner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions" (pp. 588-9).

* * * *

"Proceedings under the act having been duly instituted in this court, it acquired full jurisdiction of the subject-matter; and having taken such jurisdiction, and procured control of the vessel and freight (or their value), constituting the fund to be distributed, and issued its monition to all parties to appear and present their claims, it became the duty of all courts before which any of such claims were prosecuted, upon being properly certified of the proceedings, to suspend further action upon said claims" (p. 599).

[fol. 126] III. The prosecution of the state court action presents insuperable difficulties and necessarily involves violation of the exclusive admiralty jurisdiction.

The majority say (pages 1254-5) that the State Court suit will not interfere with the exclusive admiralty jurisdiction because there can be no "effective determination by the state court of the value of either vessel." But this observation wholly misses the point. It is not a matter of fixing the dollar value of tug and barge but a matter of determining their liabilities. On the special verdict hypothesis the state court can determine whether petitioner's liability arises from the fault of the tug, or the barge, or both. If such determination is binding it will fix, as between appellee and appellant, the amount of petitioner's limitation fund because that fund is measured by the yardstick of liability of tug or barge or both. But the cases cited at pages 13-16 of our appeal brief demonstrate, and the majority do not deny, that only the Admiralty Court has jurisdiction to fix the amount of the fund. Since the

state court cannot bind the Admiralty Court because the latter has exclusive jurisdiction to determine the amount of the fund it necessarily follows that the whole state court action must be nugatory.

Again, at pages 1255-6, the majority say that the possibility that the Admiralty Court may adjudge the petitioner not liable, while the state court may adjudge otherwise, "will present no difficulty." On the contrary, if the Admiralty Court adjudges no liability petitioner will be entitled to a decree perpetually enjoining all suits against it by any person, including appellee. This presents great difficulty if the state court enters, or attempts to enforce, a judgment.

The same difficulty exists if the Admiralty Court holds only the tug liable. The Court will then fix the tug's value as the limitation fund and perpetually enjoin all persons, [fol. 127] including appellee, from proceeding against petitioner otherwise than against that fund. How can there be "no difficulty" if the state court determines that liability flows from some fault in respect of the barge as well and enters judgment for more than the amount the Admiralty Court fixes as the limit of petitioner's liability? No such decision could possibly stand. The statute expressly provides that, where lack of privity or knowledge is established, the liability of the owner "shall not * * * exceed the amount or value of the interest of such owner in such vessel". Title 46 U. S. Code § 183(a). But if the jury finds liability on the part of both tug and barge and awards the $250,000 claimed appellee will seek to issue exception on the judgment against petitioner's bank accounts. Unless enjoined this will certainly result in the vessel owner's paying more than the value of its interest in the tug held at fault by the Admiralty Court, thus nullifying the statute.

Respectfully submitted, Lake Tankers Corporation,
By Eugene Underwood, Attorney.

Dated: New York, N. Y., April 26, 1956.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded, and that it is not made for the purpose of delay.

Eugene Underwood.

[fol. 128] [File endorsement omitted.]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1955

No. 268

[Title omitted]

PETITION FOR HEARING IN BANC—Filed June 7, 1956

To the Honorable the Judges of the United States Court of Appeals for the Second Circuit Who Are in Active Service:

Lake Tankers Corporation, appellant and petitioner in a proceeding for limitation of liability, has filed its petition for re-hearing and in this petition, addressed to all the judges of this Court who are in active service, prays that its appeal be heard and determined in banc.

Reasons for Granting this Petition

Quite recently, after considering the question in at least five cases, this Court has evolved a rule governing the circumstances under which claimants in a limitation proceed-[fol. 129] ing may obtain leave to pursue their claims outside the limitation proceeding which may fairly be stated as follows:

> Where it is clear that the limitation fund will substantially exceed the aggregate of all possible claims the restraining order will be vacated; otherwise not.

Matter of Trinidad Corporation, 229 F. 423 [Medina and Hincks, *C. JJ.* and Burke, *D. J.*]; *George J. Waldie Towing Co.* v. *Ricca*, 227 F. 2d 900 [Clark, Lumbard and Waterman, *C. JJ.*]; *Petition of Texas Company*, 213 F. 2d 479 [Chase, Swan and Frank, *C. JJ.*]; *Petition of Moran Transp. Corp.*, 185 F. 2d 386 [L. Hand, Swan and Frank, *C. JJ.*]; *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.*, 159 F. 2d 273 [L. Hand, Chase and Frank, *C. JJ.*].

In the instant case a majority of the panel (Clark and Frank, *C. JJ.*, with Hincks, *C. J.*, dissenting) affirmed a District Court order vacating the restraining order on behalf of one of eleven claimants in the proceeding where the claims aggregate $259,525 but it can not be said whether the amount of the limitation fund will be $118,500 or $165,000 or $283,000 until after there has been a trial on the merits. The amount of the fund can not be determined until after trial on the merits for this reason: Petitioner owned both tug and barge, valued at $118,500 and $165,000 respectively. The limitation fund will consist of the value only of the vessel(s) individually at fault *in rem*. *Liverpool etc. Nav. Co.* v. *Brooklyn Eastern District Terminal*, 251 U.S. 48; *The Transfer No. 21*, 248 Fed. 459 (2 Cir.); *Standard Dredging Co.* v. *Kristiansen*, 67 F. 548 (2 Cir.), certiorari denied 290 U. S. 704; *Harbor Towing Corp.* v. *Atlantic Mutual Ins. Co.*, 189 F. 2d 409 (4 Cir.).

Since the amount of the fund can not be determined until after trial it is not presently possible to say that the fund will exceed the claims and that no concourse will be necessary to distribute an inadequate fund.

[fol. 130] Obviously the majority of the panel which considered this case has made a complete departure from the recently evolved rule above stated, as Hincks, *C. J.*, demonstrates in his dissent. It is undesirable to have one panel depart so widely and so soon from a rule laid down by others. As urged in our petition for rehearing filed contemporaneously herewith, the majority of the panel has made this departure without reference to the statute, or the Supreme Court rules, or any previously decided case.

Writs of certiorari are granted very sparingly by the Supreme Court and, for practical puposes, this Court is the Court of last resort on admiralty matters. The question involved is of the utmost importance. As the Supreme Court said in a closely analogous situation:

> "the present case raises a question of great importance to the practical and successful working of the law, the decision of which, indeed, will determine whether it is to be of any real value * * *" Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 589.

The Power to Pass Upon This Petition Lies With a Majority of the Judges of This Court Who Are, in Active Service

Title 28 U. S. Code, § 46 (c), provides:

> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

Although this Court has announced no rule or procedure as to the manner of dealing with petitions for hearings or rehearings in banc there is no doubt that it has the power to [fol. 131] do so. *Western Pacific Railroad Case*, 345 U. S. 247. In that case petitions for rehearing in banc were denied by the panel that had made the original decision without submission to all the judges in active service. The Supreme Court held that this would be a proper procedure if all the judges in active service had delegated the power to consider and determine petitions for rehearings in banc to the original panel but that, absent such a delegation, the power lies in a majority of all the judges in active service. The Supreme Court said:

> "But in recognizing the full scope of § 46 (c), the full membership of the court will be mindful, of course, that the statute commits the *en banc* power to the majority of active circuit judges so that a majority always retains the power to revise the procedure and withdraw whatever responsibility may have been delegated to the division (p. 261).

There having been no announced delegation of the power to the panel we submit that in this Circuit at present the power lies in a majority of all the judges in active service. And, as stated by the Supreme Court in *Western Pacific*:

> "the question of whether a cause should be heard *en banc* is an issue which should be considered sepa-

rate and apart from the question of whether there should be a rehearing by the division" (p. 262).

It is perhaps noteworthy that in *Western Pacific* the Supreme Court said that while the statute does not compel any particular procedure, whatever procedure is adopted should be clearly explained. Following this pronouncement Judge Maris of the Third Circuit announced the procedure there. 14 F. R. D. 91 *et seq.* Every petition for rehearing is circulated to all the active judges.

In the Court of Appeals for the District of Columbia and in the Tenth Circuit petitions for rehearing are also [fol. 132] submitted for consideration to all the active judges (see Chief Judge Stephens' letter, 197 F. 2d at 1020-1; Tenth Circuit Rule 20, ¶ 7; F. C. A. Rules, Chapt. 13).

In the Eighth and Ninth Circuits the power to pass on petitions for hearings in banc has been delegated to the original panel (Eighth Circuit Rules 4 and 15 (e); F. C. A. Rules, Chapt. 11; Ninth Circuit Rule 23; F. C. A. Rules, Chapt. 12).

So far as we can ascertain the practice in the other circuits has not been announced.

Wherefore appellant respectfully prays that its appeal be heard and determined in banc by all the judges of this Court who are in active service.

Lake Tankers Corporation, By Eugene Underwood, Attorney.

Dated: New York, N. Y., April 26, 1956.

[fol. 133] IN UNITED STATES COURT OF APPEALS

In the Matter of PETITION OF LAKE TANKERS CORP., LILLIAN M. HENN, ETC., Claimant-Appellee

Before: Clark, Chief Judge, Frank and Hincks, Circuit Judges.

MEMORANDUM DECISION—Filed June 7, 1956

The petition will be considered by all of the six judges upon the briefs, appendices, and memoranda of the parties. The court suggests that counsel may find it appropriate to file new briefs restating in succinct form the points they wish to make, with a recitation of what has happened in the case, so that the additional judges now to consider the matter may be able to understand the questions at issue without the necessity of re-examining too many separate documents. Since counsel have exchanged briefs extensively to date, it would seem appropriate that if they now file such new briefs they do so simultaneously within a reasonable time, to be arranged after conference with the Clerk.

[fol. 134] [File endorsement omitted.]

[fol. 135] IN UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

* * * * * * *

[Title omitted]

Present: Hon. Charles E. Clark, Chief Judge, Hon. Jerome N. Frank, Hon. Carroll C. Hincks, Circuit Judges.

ORDER ON PETITION FOR REHEARING IN BANC, ETC.—
June 7, 1956

A petition for rehearing having been filed herein by counsel for appellant and a petition for hearing in banc having been submitted by said counsel,

Upon consideration thereof, it is

Ordered that said petition for hearing in banc be filed

Further ordered that said petition for rehearing will be considered by all six judges of this Court upon the briefs, appendices, and memoranda of the parties.

Further ordered that counsel may file, simultaneously, within a reasonable time, new briefs restating in succinct form the points they wish to make, with a recitation of what has happened in the action.

A. Daniel Fusaro, Clerk.

[fol. 136] [File endorsement omitted.]

[fol. 137] In United States Court of Appeals,
For the Second Circuit—October Term, 1955

No. 268

(Petition filed June 7, 1956 Decided August 21, 1956)

Docket No. 23965

Matter of the Petition of Lake Tankers Corporation for Exoneration from or Limitation of Liability

Before: Clark, *Chief Judge*, and Frank, Medina, Hincks, Lumbard, and Waterman, *Circuit Judges*.

On Petition for Rehearing *en banc*.

Burlingham, Hupper & Kennedy, New York City (Eugene Underwood and H. Barton Williams, New York City, of counsel), *for Lake Tankers Corporation, petitioner-appellant.*

Rosen & Rosen, Poughkeepsie, N. Y., and Mahar & Mason, New York City (Frank C. Mason, New York City, of counsel), *for Lillian M. Henn, claimant-appellee, in opposition.*

[fol. 138] Per Curiam:

Petition for rehearing *en banc* of our decision, 2 Cir., 232 F. 2d 573, affirming as modified the decision, D. C. S. D. N. Y., 137 F. Supp. 311, granted. Upon due and further

consideration by the entire court of the appeal on the merits and of the able additional briefs submitted by counsel for the respective parties, we adhere to our original decision, Judges Clark, Frank, Lumbard, and Waterman, concurring, Judges Medina and Hincks dissenting.

[fol. 139] IN UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

* * * * * * *

Present: Hon. Charles E. Clark, Chief Judge, Hon. Jerome N. Frank, Hon. Harold R. Medina, Hon. Carroll C. Hincks, Hon. J. Edward Lumbard, Hon. Sterry R. Waterman, *Circuit Judges.*

In the Matter of PETITION OF LAKE TANKERS CORPORATION, Petitioner-Appellant, LILLIAN M. HENN, Claimant-Appellee.

ORDER GRANTING PETITION FOR A REHEARING EN BANC AND ADHERING TO OPINION OF APRIL 13, 1956—August 21, 1956.

A petition for a rehearing en banc having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is granted.

Further ordered that the opinion of this court, dated April 13, 1956, be and it hereby is adhered to.

A. Daniel Fusaro, Clerk, by Ralph C. Curcio, Deputy Clerk.

[fol. 140] [File endorsement omitted.]

[fol. 141] SPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1956

No. 445

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 19, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4142-6)

Supreme Court of the United States

October Term, 1956

No. 445

In the Matter
of the
Petition of LAKE TANKERS CORPORATION,
Petitioner,
for exoneration from or limitation of liability.

LILLIAN M. HENN, Administratrix,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EUGENE UNDERWOOD,
Counsel for Petitioner,
27 William Street,
New York, N. Y.

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No.

—o—

In the Matter

of the

Petition of LAKE TANKERS CORPORATION,

Petitioner,

for exoneration from or limitation of liability.

LILLIAN M. HENN, Administratrix,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Lake Tankers Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 13, 1956, in this proceeding by a shipowner for limitation of liability under the Act of March 3, 1851.

Citations to Opinions Below

The opinion of the Court of Appeals is reported at 232 F. 2d 573. It is printed in the Appendix, *infra* page 15, *et seq.* and at page 91a of the record. Its memorandum inviting additional briefs for the re-hearing *in banc* is not reported. It is printed in the Appendix *infra* page 29, and at page 128a of the record. Its *per curiam* opinion granting the petition for re-hearing *in banc* and adhering to its

original decision is not yet reported. It is printed in the Appendix, *infra* page 30, and at page 173a of the record.

The opinion of Ryan, J. in the District Court is reported only at 1955 A. M. C. 55. It is at page 26a of the record. The first and second opinions of Weinfeld, J. are reported at 132 F. Supp. 504 and 137 F. Supp. 211. They are at page 35a and page 57a of the record.

Jurisdiction

The judgment of the Court of Appeals was entered on April 13, 1956 (R. 106a). The petition for re-hearing *in banc* was granted and the original decision adhered to on August 21, 1956 (R. 175a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented

Is the owner of a tug and barge entitled to maintain a proceeding for limitation of liability and to obtain a *concursus* and one decision, binding upon all parties as to the issues of liability, amount of the limitation fund and the amounts to be recovered by the several claimants, when it is confronted with eleven death, personal injury and loss of property claims, the aggregate of which is greater than the amount of its limitation fund as may be determined after trial?

Statute Involved

The applicable sections of the limitation statute are 46 U. S. Code §§ 183(a), 184, 185. They are printed in the Appendix hereto, *infra* page 32. Subsection (b) and the ensuing subsections of Section 183 provide for the statutory fund of $60 per ton but are limited to "seagoing" vessels and are not applicable here and are not reprinted.

Rules Involved

The applicable rules are United States Supreme Court Admiralty Rules 51, 52, 53, 54. The pertinent sections are reprinted in the Appendix hereto, *infra* page 33.

Statement

During the night of July 9-10, 1954 petitioner's barge No. 38, in tow of petitioner's tug EASTERN CITIES, was in collision, in the Hudson River, with the yacht BLACKSTONE, which capsized. Ten of her eleven passengers were rescued but respondent's husband has not reappeared. She began an action at law in the State Court against petitioner to recover $500,000 for the death. Other actions against petitioner by the survivors claimed $157,500 and petitioner accordingly filed its petition for exoneration from or limitation of liability.

An *interim* stipulation was given for $118,542.21, the value of the tug. The barge was without power and wholly controlled by the tug; hence it was thought that a stipulation for the tug's value was enough. *Liverpool etc. Nav. Co.* v. *Brooklyn Eastern District Terminal,* 251 U. S. 48, 53; *The Transfer No. 21,* 248 Fed. 459, 461 (2 Cir.). Nevertheless petitioner offered to give such further *interim* stipulation as the Court might require (R. 7a). The Court approved the *interim* stipulation as given and issued the usual restraining order enjoining the prosecution of the actions at law.

Upon respondent's motion to dismiss the petition for insufficient *interim* security the Court required petitioner to give an *interim* stipulation for the barge also. *Petition of Lake Tankers Corp.,* 1955 A. M. C. 55 (not reported elsewhere; R. 26a). Petitioner then filed an additional *interim* stipulation for $165,000, the value of the barge. Thereafter respondent filed her claim for $250,000. Claims were

also filed by the ten survivors aggregating $9,525. The total was $259,525, more than the value of either the tug or barge but less than the value of both.

Appellee then moved to vacate the restraining order so that she might proceed with her action at law, asserting that the claims aggregated less than the limitation fund, relying upon *Petition of Texas Company,* 213 F. 2d 479 (2 Cir.), certiorari denied, 348 U. S. 829. The argument was that the limitation fund was $283,542.21, the sum of the two *interim* stipulations, and the claims were only $259,525. Weinfeld, J., denied the motion holding that the amount of the fund, as distinguished from the sum of the two *interim* stipulations, could not be determined until after trial because the fund will consist of the value only of the vessel(s) at fault *in rem.* Only if both vessels are individually at fault *in rem* will the value of both go into the fund. This is settled law. *Liverpool etc. Nav. Co.* v. *Brooklyn Eastern District Terminal,* 251 U. S. 48; *The Transfer No. 21,* 248 Fed. 459 (C. A. 2); *Standard Dredging Co.* v. *Kristiansen,* 67 F. 2d 548 (C. A. 2), certiorari denied 290 U. S. 704; *Harbor Towing Corp.* v. *Atlantic Mutual Insurance Company,* 189 F. 2d 409 (C. A. 4). The judge therefore held that the premise underlying respondent's motion, i.e., that the fund exceeded the claims, was false, and denied the motion. *Petition of Lake Tankers Corp.,* 132 F. Supp. 504 (R. 35a). However, in his opinion he suggested that respondent could escape from the limitation proceeding if she would apportion her claim against tug and barge and bring the amount of the claims against each vessel to less than its value. Respondent followed this suggestion and filed a stipulation purporting to allocate her claim as between tug and barge, but her claim against petitioner remained the same, $250,000. The claims were then, and still are, as follows:

	In this proceeding	*In pending actions at law*
Respondent		
allocated to tug	$100,000	
allocated to barge	150,000	
against petitioner	250,000	$500,000
Not allocated as between tug and barge:		
Roan	4,400	32,500
Carlson	3,000	50,000
Cruz	225	25,000
Strong	1,600	50,000
Van Wart	50	
Hughes	50	
McNutt	50	
Raymond	50	
Cady	50	
Ratledge	50	
Total	$259,525	$657,500

The aggregate of claims against petitioner in this proceeding is $259,525. The eventual limitation fund, as distinguished from the *interim* security, will only exceed the claims if both vessels are held at fault. If only one is held at fault the fund will not be adequate and a concourse will be necessary to distribute it pro rata. Which vessel was at fault, or whether both were, cannot be determined until after trial.

Whether or not the fund proves to be adequate, the eleven claims against petitioner arise out of the same occurrence and turn upon the same facts and law. A concourse will permit their decision in one proceeding the result of which will be binding upon them vis-a-vis petitioner and also among themselves. The latter is an essential consideration if the fund should be inadequate.

Nevertheless, after apportioning her claim, respondent again moved to vacate the restraining order, this time on

the ground that the claims against each vessel were less than its value. Weinfeld, J., granted this motion, holding that there are two funds, each more than the claims against it. *Petition of Lake Tankers Corporation,* 137 F. Supp. 311 (R. 57a).

On appeal a divided Court affirmed, holding that concourse will be granted only when necessary to distribute an inadequate fund, that this single proceeding, by a single petitioner, must be regarded as if it were two separate proceedings because two vessels are involved, and that, since the claims allocated to each vessel are less than her value, respondent can not be held in the concourse of the limitation proceeding. (R. 96a).

In a strong dissent, Hincks, C. J., held that this single proceeding, by a single petitioner, cannot be regarded as if it were two; that since the claims against petitioner exceed the possible fund the Admiralty Court must keep them all in the limitation proceeding and that the prosecution of respondent's action at law will be "wholly fruitless and nugatory" (R. 103a).

Petitioner filed a petition for a re-hearing *in banc.* After four months the Court filed its *per curiam* opinion granting the petition for re-hearing *in banc* but adhering to its original decision. No reasons for the decision were stated. Judges Clark, Frank, Lumbard and Waterman concurred, Judges Medina and Hincks dissented.

REASONS FOR GRANTING THE WRIT

I. The Court construed the statute contrary to the rule established by this Court.

The majority below predicated its decision wholly upon the view that it "must" regard this single proceeding as if it were two (*infra* p. 20). There is no such compulsion in the statute, the Admiralty Rules, or in precedent.

In fact there is only one proceeding, only one petitioner. After a trial on the allegations of fault against tug and barge, if liability is found there will be only one limitation fund, paid into court by petitioner. Because there are two *interim* stipulations does not mean that there are two proceedings. In numerous cases the courts have dealt with single limitation proceedings by the owners of two or more vessels without finding it necessary to proceed as if there were two. *United States* v. *The Australia Star*, 172 F. 2d 472 (2 Cir.); *Standard Dredging Co.* v. *Kristiansen*, 67 F. 2d 548 (2 Cir.); *The Transfer No. 21*, 248 Fed. 459 (2 Cir.); *The Bordentown*, 40 Fed. 682 (S. D. N. Y.); *The Captain Jack*, 169 Fed. 455 (D. C. Conn.); *The Alvah H. Boushell*, 38 F. 2d 980 (4 Cir.); *Thompson Towing & Wrecking Ass'n* v. *McGregor*, 207 Fed. 209 (6 Cir.); *The Columbia*, 73 Fed. 226 (9 Cir).

To construe the statute narrowly and grudgingly, as the Court did, is contrary to the rule, thoroughly established by this Court, that the statute is to be construed liberally for the benefit of shipowners. *Norwich Company* v. *Wright*, 13 Wall (80 U. S.) 104, 121; *Providence & N. Y. S.S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 588-9; *Butler* v. *Boston and Savannah Steamship Co.*, 130 U. S. 527, 550-1; *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 214-16; *Flink* v. *Paladini*, 279 U. S. 59, 62-3; *Larsen* v. *Northland Transportation Co.*, 292 U. S. 20, 24; *Just* v. *Chambers*, 312 U. S. 383, 385; *Coryell* v. *Phipps*, 317 U. S. 406, 411; *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 414.

This Court has consistently adopted a broad rather than a restrictive interpretation of the statute. As the Court pointed out in *Butler* v. *Boston and Savannah Steamship Co.*, 130 U. S. 527, 550, it was at first contended that the Act did not apply to collisions but this "pretence" was rejected in *Norwich Company* v. *Wright*, 13 Wall (80 U. S.) 104. It was next insisted that the Act did

not extend to loss by fire but this restrictive view was rejected in *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578. In the *Butler* case the claim was that the Act did not extend to claims for personal injury and death, but again this Court rejected the narrow construction. In 1881 this Court held that, although the Act did not so provide expressly, it could be invoked by a British shipowner in the case of a collision on the high seas between his vessel and an American vessel. *The Scotland*, 105 U. S. 24. Years later this Court held that the Act could be invoked by a British shipowner in respect of a disaster suffered by a British ship on the high seas where no American vessel was involved, although it had many times said in earlier years that the principal purpose of the Act was to put American shipowners on a parity with foreign shipowners. *The Titanic*, 233 U. S. 718. Indeed, this Court has long since construed the Act broadly to hold that it is not limited to maritime torts, *Richardson* v. *Harmon*, 222 U. S. 96, and that it may be availed of by one who is only a stockholder of a corporate shipowner, *Flink* v. *Paladini*, 279 U. S. 59.

In recent years there has been a gradual whittling away of the limitation statute by courts seemingly out of sympathy with the Congressional purpose. But the Congressional purpose has not been changed since the statute was originally enacted in 1851. Following the MORRO CASTLE disaster in 1934 the Congress held extensive hearings and reviewed the matter thoroughly. The statute was not repealed. It was modified somewhat, on points that do not touch the problem here, and reaffirmed. See Mr. Justice Frankfurter's review of the 1936 amendments to the statute in *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 414-417.

The decision below frustrates the reaffirmed Congressional purpose and is a giant step toward the judicial repeal of the statute.

II. The Court denied petitioner a *concursus*, contrary to the decisions of this Court.

Petitioner is confronted with eleven claims arising out of this collision. This Court has held that a *concursus* is the heart of the limited liability statutes, and that the limitation proceeding is like a bill in equity to enjoin a multiplicity of suits, looking to a complete disposition of a many cornered controversy. *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 415; *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 216; *Butler* v. *Boston and Savannah Steamship Co.*, 130 *U. S.* 527, 552; *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 595-8; *The Scotland*, 105 U. S. 24, 33; *Ex Parte Slayton*, 105 U. S. 451, 452; *Just* v. *Chambers*, 312 U. S. 383, 385-6.

The decision below requires petitioner to litigate respondent's claim in her action at law outside the limitation proceeding. As it appears at the moment the other ten claims will be heard in the limitation proceeding. However, if the decision below is not reversed it is almost certain that the other ten will ask and obtain leave to proceed with their actions at law also. If the restraining order is vacated to allow respondent to proceed separately there is no reason why it should not be vacated for the others. In that event there will have to be eleven trials and the purpose of the limitation statute will have been wholly defeated.

The Court did not put its decision on the ground that no *concursus* will be necessary. The Court has evolved a "rule" that claimants in a limitation proceeding may have the restraining order vacated, and may proceed with their separate actions in other courts, if, even after jurisdiction has been taken because the claims exceed the fund, they, by concerted action among themselves for the obvious purpose of defeating jurisdiction, reduce their claims to an aggregate figure just below the probable fund. *Petition of Texas Company*, 213 F. 2d 479 (2 Cir.). Here the

eleven claims as filed in this proceeding aggregate $259,500 and as filed in pending State court actions aggregate $657,500, yet petitioner's limitation fund will not exceed $118,500, the value of the tug, unless somehow the barge, without motive power and wholly under the control of the tug, is also held at fault.

But the Second Circuit's "rule" that an inadequate fund is a prerequisite to maintaining a limitation proceeding is at odds with several decisions of this Court. Admiralty Rule 53 permits the petitioner to contest his liability. If he does so successfully there will be no fund because there is no liability. Nevertheless the proceeding may be maintained. *Butler* v. *Boston and Savannah Steamship Co., supra,* 130 U. S. 527, 552; *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co., supra,* 273 U. S. 207, 215. In the converse situation, where there is liability but without limitation, i.e., there is not an inadequate fund to distribute, this Court has held that the Admiralty Court has both the *power* and the *duty* to continue the proceeding. *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co., supra,* 273 U. S. 207, 220; *Just* v. *Chambers,* 312 U. S. 383; *Spencer Kellogg & Sons, Inc.* v. *Hicks,* 285 U. S. 502, 512.

In *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co., supra,* 109 U. S. 578, this Court assumed a situation where, due to the total loss of the vessel and the absence of freight money, there is no fund, yet held that the proceeding could be maintained. Later this situation actually arose and the proceeding was sustained. *Petition of Wood* (*The Susan*), 124 F. Supp. 540. So also where, after trial, the petitioner is held liable and granted the right to limitation but the claims prove to be less than the fund. The proceeding is not dismissed but the Court pays the claimants out of the fund and repays the balance to the petitioner. *Briggs* v. *Day,* 21 Fed. 727. Compare *The George W. Fields,* 237 Fed. 403; *The Tug No. 16,* 237 Fed. 405.

Except for the recent decisions in the Second Circuit just referred to there is no rule that an inadequate fund is a prerequisite to the maintenance of a limitation proceeding. The only prerequisite in the decisions of this Court has been the existence of multiple claims and a reasonable apprehension that they will exceed the value of petitioner's interest in his vessel. Both conditions are fulfilled here. When petitioner began this proceeding actions at law had been begun against it aggregating $657,500. Since the value of its interest in both vessels and their pending freight was less than $300,000 petitioner was eminently justified in filing its petition and claiming the benefits of the statute. Jurisdictional facts then being present, the Admiralty Court unquestionably obtained jurisdiction. The effect of the reduction of the claims, and the allocation of respondent's claim between tug and barge, has been, as the matter stands on the decision below, to deprive the Admiralty Court of jurisdiction which had previously and properly attached. This is directly contrary to the rule laid down by this Court in diversity cases. In such cases this Court has held that if the claim exceeds $3,000, jurisdiction attaches and a subsequent reduction in amount will not deprive the Court of jurisdiction. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283. Any other decision would place the Court's jurisdiction at the whim of plaintiffs' attorneys; an unseemly situation.

Such "procedural manoeuvring" was not allowed in *Petition of Boraks*, 142 F. Supp. 364.

III. The delegation to a State Court of the determination of a vessel's liability *in rem* is nugatory.

The Federal Court sitting in Admiralty has exclusive jurisdiction of all questions affecting the limitation of liability. *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *In re Morrison*, 147 U. S. 14; *The San Pedro*, 223 U. S. 365; *Hartford Accident and Indemnity Company*

v. *Southern Pacific Co., supra,* 273 U. S. 207; *Langnes* v. *Green,* 282 U. S. 531; *Ex Parte Green,* 286 U. S. 437.

The amount of the limitation fund is a matter exclusively for the Admiralty Court. *Petition of Red Star Barge Line,* 160 F. 2d 436 (2 Cir.); *W. E. Hedger Transp. Corp.* v. *Gallotta,* 145 F. 2d 870 (2 Cir.); *The Norco,* 66 F. 2d 651 (9 Cir.); *Petition of McAllister Bros.,* 96 F. Supp. 575; *The Kearny,* 3 F. Supp. 718.

The Admiralty Court alone has the power to determine the liability of a vessel *in rem.* The State Court is not competent to adjudicate *in rem* liabilities. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 216; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 160; *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109. Whether the fund shall consist of the value of the tug, or the barge, or both will turn upon whether either or both is at fault *in rem. Liverpool etc. Nav. Co.* v. *Brooklyn Eastern District Terminal, supra,* 251 U. S. 48; *The Transfer No. 21,* 248 Fed. 459 (2 Cir.). Necessarily, therefore, only the Admiralty Court has jurisdiction to adjudicate the charges of fault against tug and barge. This being so, the prosecution of respondent's action at law must be wholly nugatory.

The procedure of special verdict visualized by the court below could have no binding effect. Suppose the State Court were to hold both tug and barge, fix their aggregate value at $283,000, and fix appellee's damages at $250,000. But suppose also that in the limitation proceeding the Admiralty Court, finding only the tug at fault, enters a decree allowing petitioner to limit its liability to the tug's value, $118,000. Which result prevails; what then is the limit of petitioner's liability? The Admiralty Court will then fix the tug's value as the limitation fund and perpetually enjoin all persons, including appellee, from proceeding against petitioner otherwise than against that fund. The State Court's decision that liability flows from some fault in respect of the barge as well, and its judgment

for more than the amount the Admiralty Court fixes as the limit of petitioner's liability cannot possibly stand.

Suppose the State Court holds only the tug and values her at $118,000, but in the limitation proceeding the Admiralty Court holds both tug and barge. Petitioner has not waived any right to claim *res judicata* as to the decisions of the State Court. In this situation the Federal Court fund would be $283,000. The other claimants would collect a maximum of $9,525 and petitioner would have to pay appellee only $118,000 although her damages are $250,000 and there remained $155,475 in the Admiralty Court fund.

For a third possibility, suppose the Admiralty Court holds petitioner not liable but the State Court finds liability. Upon a finding of no liability the Admiralty Court will enter the usual decree of exoneration which incorporates a perpetual restraining order forbidding the prosecution of any and all claims against petitioner arising out of this incident. Either this would prevent appellee from collecting any judgment entered on the State Court's finding of liability, rendering the whole State Court proceedings fruitless, or, if the State Court judgment were collected it would be in contempt of the Admiralty Court's decree and in violation of the mandate of the limitation statute.

Only hopeless confusion can result from allowing respondent to proceed separately. Whatever the State Court decides as to the liabilities as between petitioner and respondent, the other ten claimants will not be bound; nor will petitioner be bound as to them. This will necessitate at least another trial of all the issues in the limitation proceeding and if, as petitioner expects, the other ten ask and obtain leave to proceed separately, ten other trials. These could easily result in several varying decisions as to liability the sum of which can readily exceed the value of the vessels.

Concursus is at the heart of the matter and this is plainly a case where *concursus* is both desirable and neces-

sary. Petitioner has complied with the requirements of the statute and the Admiralty Rules and is entitled to *concursus*.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE UNDERWOOD,
Counsel for Petitioner.

New York, N. Y.,
September 21, 1956.

Appendix

(Opinion of United States Court of Appeals, For the Second Circuit, on Appeal From Order)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 268—October Term, 1955.

(Argued February 17, 1956 Decided April 13, 1956.)

Docket No. 23965

In the Matter

of the

Petition of Lake Tankers Corporation for Exoneration from or Limitation of Liability.

Before:

CLARK, FRANK and HINCKS,

Circuit Judges.

Appeal from an order, of the United States District Court for the Southern District of New York, entered by Judge Weinfeld. Modified and Affirmed as modified.

BURLINGHAM, HUPPER & KENNEDY (New York, New York), *Proctors for Petitioner.*

ROSEN & ROSEN, *Proctors for Claimant-Appellee.*

On July 10, 1954 the yacht Blackstone was proceeding down the Hudson River. Petitioner's tug, Eastern Cities,

push-towing petitioner's barge L. T. C. No. 38, was proceeding up the river. The Blackstone ran into the bow of L. T. C. No. 38 and capsized. Ten of the eleven persons aboard the Blackstone were rescued by the Eastern Cities, but appellee's decedent was drowned. Appellee began an action in the New York Supreme Court, Ulster County, against petitioner to recover $500,000 damages for the loss of her husband's life, alleging negligence on petitioner's part in respect of its operation of both the tug and the barge. Four other actions by survivors were begun in the State Court, alleging damages aggregating $157,000. On October 6, 1954, petitioner filed, in the court below, a petition for its exoneration from or limitation of liability. The petition alleged that the collision occurred without fault on the part of any of petitioner's servants and that petitioner was entitled to exoneration; it also alleged that the collision occurred without petitioner's privity or knowledge and that, if liable, petitioner was entitled to limit its liability to the value of its interest in both vessels. However, bond was given for $118,542.21, representing only the value of petitioner's interest in tug Eastern Cities and her pending freight. On October 8, 1954, the usual restraining order was issued, enjoining the beginning or prosecution of claims against petitioner except in the limitation proceeding; that order was not limited to the tug.

Appellee appeared specially and moved to dismiss the petition and to vacate the restraining order, on the ground that the bond failed to include the value of petitioner's interest in barge L. T. C. No. 38. This motion was denied by Judge Ryan, who continued the restraining order in force, conditioned, however, upon petitioner's filing an additional bond for the value of its interest in the barge, failing which the restraint would be modified so as to continue in effect only as to suits against petitioner as owner of the tug. Petitioner then filed an additional bond for the barge in the sum of $165,000. Appellee thereupon filed in the limitation proceeding, her claim for $250,000. Other

claims, aggregating $9,525 were filed on behalf of the ten rescued survivors.

Appellee then moved before Judge Weinfeld to vacate the restraining order as to her state court suit, on the theory that, since the total security on behalf of the tug and barge amounted to $283,542.21 and the claims totalled $259,525, upon the filing of appropriate stipulations in accordance with this Court's decision in *Petition of Texas Co.*, 213 F. 2nd 479, the restraint should be lifted. Judge Weinfeld denied that motion (in an opinion reported in 132 F. Supp. 504) without prejudice to a further application by appellee in the event appropriate stipulations were filed bringing all claims against petitioner as to each vessel within the amount of the bond as to such vessel. On September 23, 1955 the ten claimants, other than appellee, filed the usual stipulations agreeing not to increase the amounts of their claims as made, nor to enter judgments in excess of the stipulated amounts and waiving any claim of *res judicata* relative to the issue of limited liability with respect to either of the vessels. On the same day appellee filed a stipulation reducing her claim against petitioner as to the tug Eastern Cities to $100,000 and as to the barge to $150,000. She also agreed not to increase the amount of either of said claims as to either of the vessels, or to enter judgment in excess of the stipulated amounts of her claims against petitioner as owner of either of them, and she waived any claim of *res judicata* relative to the issue of limited liability in respect of either of the vessels.

Appellee again moved for modification of the restraining order. Judge Weinfeld wrote an opinion granting the motion, and, on January 17, 1956 entered an order to that effect. His order was explicitly based on appellee's stipulation (including partial releases, to which she had sworn before a notary public). In the stipulation and partial releases, she agreed to reduce her claim against petitioner (1) as to the tug to $100,000 and (2) as to the barge to $150,000. The other ten claims totalled $9,525.

In his opinion, Judge Weinfeld said in part: "In addition to the moving claimant there are ten others and the eleven claims constitute all possible claims which could be filed in this proceeding as a result of the disaster and the time to file has expired. The bond filed on behalf of the tug Eastern Cities is in the sum of $118,542.21, while the claims asserted against her under the stipulations filed by the claimants are limited to $109,525; the bond filed on behalf of the barge L. T. C. No. 38 is in the sum of $165,000, while the claims asserted against her under the stipulations filed by claimants are limited to $159,525. * * * There are now two separate funds, one for the tug and one for the barge. Each limitation fund is clearly in excess of the total sum of the claims asserted as against each vessel. A special verdict may be applied for which would spell out the precise liability that may be imposed with respect to each vessel. It is not to be presumed that the state court will deny an appropriate application for a special verdict. Thus in the event, under a special verdict, there is a finding of negligence in the operation of the tug and not of the barge, the moving claimant's recovery, under her stipulation, could not exceed the amount of her reduced claim. Accordingly, the total of her judgment and the remaining claims would be limited to the bond posted for the tug, which would preclude resort to the bond posted for the barge. And alternatively if liability were established solely because of the negligent operation of the barge, no recourse could be had as against the bond posted for the tug. Of course if liability should be found with respect to both the tug and barge, a different situation would prevail. Since petitioner as shipowner is fully protected in the limitation of liability as to each vessel, there is no sound reason why claimant should not be permitted to proceed with her action in the state court—the forum of her choice."

In the Appendix to this court's opinion are set forth pertinent parts of Judge Weinfeld's order and of appellee's stipulation (including her partial releases). From Judge Weinfeld's order, petitioner has appealed.

FRANK, *Circuit Judge*:

In *Petition of Texas Co.*, 213 F. 2nd 479, 482 (C. A. 2), we stated, as follows, the principles applicable here, in accordance with our previous decisions: "Absent an insufficient fund, (1) the statutory privilege of limiting liability is not in the nature of a *forum non conveniens* doctrine, and (2) the statute gives a ship-owner, sued in several suits (even if in divers places) by divers persons, no advantage over other kinds of defendants in the same position. Concourse is to be granted 'only when * * * necessary in order to distribute an inadequate fund.'[1] The purpose of limitation proceedings is not to prevent a multiplicity of suits, but in equitable fashion, to provide a marshalling of assets—the distribution pro rata of an inadequate fund among claimants, none of whom can be paid in full."[2] We quoted the provisions of 46 U. S. C. A. Section 184 that, when loss is suffered by several persons, "and the whole vessel, and her freight for the voyage, *is not sufficient to make compensation to each of them,* they shall receive compensation * * * *in proportion to their respective losses,*" and that the limitation proceedings are "for the *purpose of apportioning the sum* * * * among the parties entitled thereto." Subsequently, we said the same in *Matter of Trinidad Corp.*, — F. 2nd — (C. A. 2, December 28, 1955) and in *George J. Waldie Towing Co.* v. *Ricca,* 227 F. 2nd 900, 901 (C. A. 2).

Section 184 covers the liability of "the owner" of "the vessel." In the case at bar, it happens that petitioner owns two vessels, and may be liable for the conduct of either vessel or both. Had each vessel been owned by a separate

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[1] Here we cited *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.*, 159 F. 2nd 273, 276 (C. A. 2).

[2] Here we cited *Petition of Moran Transportation Corp.*, 185 F. 2nd 386, 388-389 (C. A. 2); *Petition of Red Star Barge Line, Inc.*, 160 F. 2nd 436 (C. A. 2); *The Aquitania*, 14 F. 2nd 456, 458, affirmed 20 F. 2nd 457 (C. A. 2).

owner, each owner could have instituted a limitation proceeding. So the owner here could have instituted one such proceeding to limit its liability as tug-owner to the value of the tug, and another proceeding as barge-owner to limit its liability to the value of the barge. The owner cannot enlarge its rights under the statute by the mere expedient of coupling the two proceedings.

Accordingly, we must regard this case just as if it comprised two separate limitation proceedings. On that basis, we affirm. For, in respect of petitioner's liability as owner of each vessel, the order and appellee's stipulation (including her partial releases) comply with what we required in the *Trinidad* case. We interpret the order, the stipulation, and the partial releases, to relate to the liability of petitioner *in personam* as the owner of each vessel separately. All the claims against petitioner as the tug's owner come to $109,525, an amount less than the bond of $118,542.21 as to petitioner's liability as owner of that vessel; all the claims against petitioner as the barge's owner come to $159,525, an amount less than the bond of $165,000 as petitioner as owner of that vessel. Consequently, there was not an insufficient fund in respect of petitioner's liability either as owner of the tug or as owner of the barge.

As Judge Weinfeld said, a special verdict in the state court suit will decide whether petitioner is liable for the conduct of either or neither vessel, or both vessels. That suit will not interfere with the exclusive admiralty jurisdiction of the court below affecting the limitation of liability: (a) No judgment of the state court can operate *in rem*. (b) Appellee's stipulation (which includes a waiver of any claim of *res judicata* relevant to the issue of limited liability of petitioner as owner of either the tug or the barge) and her partial releases, together with the reserved jurisdiction of the district court, prevent any effective determination by the state court of the value of either vessel.

We think, however, Judge Weinfeld's order should be amended to include the following: "If claimant obtains a

judgment in her state court suit for an amount in excess of $100,000, an injunction will issue permanently enjoining her from collecting such excess unless the judgment rests on a special verdict allocating the amount as between the libelant as owner of the tug and as owner of the barge respectively. Thus if the judgment exceeds $100,000 and the jury finds libelant liable solely as owner of the tug, she will be enjoined from collecting any excess. If the jury finds that the libelant is liable solely as owner of the barge, she will be enjoined from collecting any amount in excess of $150,000."

The other claimants are apparently content to proceed for a determination of their claims in the limitation proceeding.[3] It is possible that the court below, in passing on their claims, may adjudge the petitioner not liable, while the state court in appellee's suit may adjudge otherwise. But such an eventuality will present no difficulty. For the adjudication in the limitation proceeding concerning liability or non-liability to the other claimants will not serve as *res judicata* or estoppel by verdict for or against appellee in her state court suit, nor will the adjudication concerning liability or non-liability in appellee's state court suit have such an effect for or against the other claimants in the limitation proceeding.

Modified and affirmed as modified.

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[3] Petitioner suggests that perhaps the other claimants may seek to proceed elsewhere. The resultant problem cannot arise unless and until they file appropriate stipulations and partial releases. Moreover, an application to relax the restraining order as to them must be made seasonably, as we said in *Trinidad*; and the limitation proceeding was instituted a year and four months ago.

APPENDIX

Judge Weinfeld's order of January 17, 1956 reads, in part, as follows:

"Ordered that the motion of Lillian M. Henn * * * for an order vacating the restraining order entered herein on October 8th, 1954 with respect to her suit pending in the Supreme Court, State of New York, Ulster County, be and the same hereby is in all respects granted subject, however, to the following conditions:

1. that claimant shall be permitted to prosecute her suit in Supreme Court, State of New York, Ulster County only to judgment;

2. that the injunction of October 8th, 1954, insofar as it enjoins collection of the judgment elsewhere than in this proceeding, shall be continued;

3. that the Court expressly reserves jurisdiction to reestablish a concourse and to adjudicate the petitioner's right to a limitation in the event that the funds should ultimately prove to be inadequate;

4. that in no event shall this claimant recover from the fund an amount in excess of her claim as reduced by the partial releases heretofore given until all other claims have been satisfied in full;

5. that the Court further retains jurisdiction of this proceeding against the event that petitioner's right to limit liability of either the tug Eastern Cities or barge L. T. C. No. 38 should be questioned in any other forum."

Appellee's stipulation and partial releases read, in part, as follows:

"1. She reiterates and affirms the terms of the written stipulation, heretofore executed by her on September 6th, 1955, duly acknowledged before a Notary Public of the

State of New York, Dutchess County, and filed herein on September 23rd, 1955, providing:

(a) that her claim as against the tug Eastern Cities, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is reduced to the sum of $100,000;

(b) that her claim as against the barge L. T. C. No. 38, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is reduced to the sum of $150,000;

(c) that she will not increase the amount of either of said claims as against either of the said vessels, as above stated, or the petitioner and its stipulators for value at any future date beyond the amounts so stated;

(d) that she will not enter judgment in any Court in excess of the stipulated amounts of her claims against petitioner as owner of either of said vessels;

(e) that she hereby waives any claim of res judicata relevant to the issue of limited liability with respect to either of said vessels, based on a judgment in any other Court.

2. As her unconditional partial release she represents:

(a) that the total amount of all claims filed herein as against the tug Eastern Cities and the petitioner, as her owner, is $109,525; the total amount of all claims filed herein as against the barge L. T. C. No. 38 and the petitioner, as her owner, is $159,525;

(b) that in consideration of the entry of an order upon this stipulation, pursuant to the decisions of Honorable Edward Weinfeld, United States District Judge, dated December 29th and 30th, 1955, modifying the injunctive order entered herein October 8th,

1954, to permit the prosecution of her suit in Supreme Court, State of New York, Ulster County, she hereby releases and forever discharges the petitioner, its successors and assigns and the tug Eastern Cities and the barge L. T. C. No. 38 unconditionally but partially to the extent hereinafter described from all causes of action whatsoever, in law, in admiralty or in equity which against them she ever had, now has or which her successors hereafter shall or may have by reason of the death of Robert C. Henn on July 10th, 1954, resulting from a collision between the motor yacht Blackstone, on which he was a passenger, with the barge L. T. C. No. 38 in tow of the tug Eastern Cities, in the Hudson River; it being the intent and purpose of this release that it be partial to the extent of the difference between the amount of her claim originally filed herein in the sum of $250,000 and the reduced amount of her claim heretofore, stipulated as against the tug Eastern Cities of $100,000, so that the amount hereby released as to such tug and the petitioner is $150,000; and it being the further intent and purpose of this release that it be partial to the extent of the difference between the amount of her claim originally filed herein in the sum of $250,000 and the reduced amount of her claim heretofore stipulated as against the barge L. T. C. No. 38 of $150,000, so that the amount hereby released as to such barge and the petitioner is $100,000.

3. She consents to, and hereby authorizes her proctors, Rosen & Rosen, to submit an order to the Court for entry and providing:

(a) that she shall be permitted to prosecute her suit in Supreme Court, State of New York, Ulster County only to judgment:

(b) that the injunction of October 8th, 1954, insofar as it enjoins collection of the judgment elsewhere than in this proceeding, shall be continued;

(c) that the Court expressly reserves jurisdiction to reestablish a concourse and to adjudicate the petitioner's right to a limitation in the event that the funds should ultimately prove to be inadequate;

(d) that in no event shall this claimant recover from the fund an amount in excess of her claim as reduced by the partial releases heretofore given until all other claims have been satisfied in full;

(e) that the Court further retains jurisdiction of this proceeding against the event that petitioner's right to limit liability of either the tug Eastern Cities or barge L. T. C. No. 38 should be questioned in any other forum.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, as the Administratrix of the Estate of Robert C. Henn, deceased, the 7th day of January in the year One Thousand Nine Hundred and Fifty-six.

LILLIAN M. HENN L. S.
Administratrix of the Estate of
Robert C. Henn, deceased

(Verified on January 7, 1956, by Lillian M. Henn, as claimant.)"

HINCKS, *Circuit Judge* (dissenting):

My brothers say: "We must regard this case just as if it comprised two separate limitation proceedings. On that basis, we affirm." Even if I agreed that this treatment of the situation is correct, I should still be constrained to dissent. For on that basis, in the tug proceeding the

claimant's claim is for damages caused by the tug in the amount as reduced by stipulation, of $100,000, and the owner's liability depends on the fault of the tug; in the barge proceeding the claim is for damages caused by the barge in the reduced amount of $150,000, and the owner's liability depends on the fault of the barge.

Such being the situation, suppose the state court on a general verdict enters judgment in favor of the claimant in excess of $100,000. What possible effect can such a judgment have? It appears to me that it would be wholly uncollectible in either limitation proceeding. Under the amendment of the order below required by the court's opinion, the claimant will be enjoined "from collecting such excess." Under an original provision of the order, the claimant is enjoined from all collection "of the judgment elsewhere than in this [the limitation] proceeding." The general judgment will not be *res judicata* on the issue of liability in the tug proceedings; it does not import a finding of fault by the tug. Likewise, in the barge proceedings; it does not import a finding of fault in the barge. Thus, notwithstanding the judgment, the issue of liability will be open in both proceedings.

Or suppose that in the state court the claimant obtains a judgment on a general verdict in an amount say of $5000 and being disappointed in the amount thereof decides to press her claims in the limitation proceedings. On no theory of *res judicata* or collateral estoppel can the owner use the state court judgment as decisive on the issues. It will not bar prosecution of the claim in the tug proceedings, because it did not adjudicate that the tug was not at fault. And so in the barge proceedings. The limitation court, perhaps after all the other claims have been heard and adjudicated, will have to hold a full-fledged trial for its determination of the claimant's claim, with a result which may or may not be more satisfactory to the claimant.

Thus considered, the disposition of the court, in my view, subjects the parties to the labor and expense of litigation which well may prove to be wholly fruitless and nugatory.

That such may prove to be the result, I think more than a remote possibility. For that result will follow unless in the state court trial the judge shall require the jury to find specially whether the plaintiff's injury (if caused by the owner's negligence) was caused by negligence in its conduct of the tug or by negligence in the barge. Without special findings, it would be necessary for the jury to determine only whether a proved act of negligence caused the plaintiff's injury. The requirement of special findings will require the jury to determine also whether a proved act of negligence was part of the conduct of a particular vessel,—a determination which under the evidence may involve confusion and difficulty. The plaintiff might prove an act of negligence and yet fail to prove that the act was a part of the owner's conduct of a particular vessel. In my opinion, it is by no means unlikely that the judge would refuse a request to require special findings on the ground that the request if granted would inject into the case an additional issue the solution of which is not essential to the decision of the case under the law of the state. It may also be observed that if a special verdict were required and claims of error should be predicated on the disposition of that additional issue, the parties would be without the usual remedy by motion or appeal. For it is hardly to be supposed that the trial court or an appellate court would give relief for an error pertaining to an issue which under the law of the state did not affect the validity of the judgment.

My brothers cite our former decisions in *Texas, Trinidad* and other cases for the proposition that a claimant's choice of forum should be protected and that the Limitation Act does not entitle an owner to a determination in the limitation proceedings of its liability to a multiplicity of claimants growing out of a multiple tort except in cases in

which by reason of an inadequate fund a concursus is required. But these cases went no further than to permit litigation at law which would be dispositive,—not litigation which may prove to be nugatory. I think it an unwarranted and undesirable extension of the *Texas* doctrine to sanction procedure whereby two trials, one at law and the other in the limitation proceedings, may be required for a final determination of the issues of a single claim.

I would hold that we have here one proceeding for the limitation of the owner's personal, indivisible, liability to the appellee, among other claimants, on her single indivisible claim. I deprecate sanction for a procedure whereby indivisible causes of actions and indivisible liabilities may be split and their respective fragments may be litigated in separate proceedings. If, as I think, this is a single limitation proceeding, even though two vessels are involved, the claims concededly exceed the fund which may be fixed, and the *Texas* doctrine is inapplicable.

(Memorandum Inviting Additional Briefs for Rehearing)

UNTED STATES COURT OF APPEALS

SECOND CIRCUIT

In the Matter

of

PETITION OF LAKE TANKERS CORP.,

LILLIAN M. HENN, etc.,

Claimant-Appellee.

Before:

CLARK, *Chief Judge*, FRANK and HINCKS, *Circuit Judges*.

The petition will be considered by all of the six judges upon the briefs, appendices, and memoranda of the parties. The court suggests that counsel may find it appropriate to file new briefs restating in succinct form the points they wish to make, with a recitation of what has happened in the case, so that the additional judges now to consider the matter may be able to understand the questions at issue without the necessity of re-examining too many separate documents. Since counsel have exchanged briefs extensively to date, it would seem appropriate that if they now file such new briefs they do so simultaneously within a reasonable time, to be arranged after conference with the Clerk.

(Opinion of United States Court of Appeals, For the Second Circuit, on Petition for Rehearing en banc)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 268—October Term, 1955.

(Petition filed June 7, 1956 Decided August 21, 1956.)

Docket No. 23965

Matter of the Petition of LAKE TANKERS CORPORATION for Exoneration from or Limitation of Liability.

Before:

CLARK, *Chief Judge*, and
FRANK, MEDINA, HINCKS, LUMBARD, and WATERMAN, *Circuit Judges*.

On Petition for Rehearing *en banc*.

BURLINGHAM, HUPPER & KENNEDY, New York City (Eugene Underwood and H. Barton Williams, New York City, of counsel), *for Lake Tankers Corporation, petitioner-appellant.*

ROSEN & ROSEN, Poughkeepsie, N. Y., and MAHAR & MASON, New York City (Frank C. Mason, New York City, of counsel), *for Lillian M. Henn, claimant-appellee, in opposition.*

PER CURIAM:

Petition for rehearing *en banc* of our decision, 2 Cir., 232 F. 2d 573, affirming as modified the decision, D. C. S. D. N. Y., 137 F. Supp. 311, granted. Upon due and further consideration by the entire court of the appeal on the merits and of the able additional briefs submitted by counsel for the respective parties, we adhere to our original decision, Judges Clark, Frank, Lumbard, and Waterman, concurring, Judges Medina and Hincks dissenting.

(Limitation Statute. Title 46 U. S. Code §§183(a), 184, 185)

"§ 183(a). The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property * * *, or for any loss, damage, or injury by collision * * * done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

"§ 184. Whenever any such embezzzlement, loss, or destruction is suffered * * * and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose * * * the owner of the vessel * * * may take the appropriate proceedings in any court, for the purpose of apportioning the same for which the owner of the vessel may be liable among the parties entitled thereto.

"§ 185. The vessel owner * * * may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the Court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the Court may from time to time fix as necessary to carry out the provisions of § 183 of this title * * *. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

(United States Supreme Court Rules 51, 52, 53, 54)

"RULE 51. The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability * * * may file a petition in the proper district court * * *. With his petition the petitioner may, if he so elects, file an interim stipulation, with sufficient sureties or an approved corporate surety, for the payment into Court whenever the Court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel * * *.

"Upon the filing of such interim stipulation * * * the Court shall issue a monition * * *.

"The said Court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect of any claim or claims subject to limitation in the proceeding.

"RULE 52. * * * Proof of all claims which shall be filed in pursuance of said monition shall thereafter be made before a commissioner * * * and on confirmation of said commissioner's report * * * the moneys paid or secured to be paid into Court as aforesaid * * * shall upon determination of liability be divided pro rata * * * amongst the several claimants in proportion to the amount of their respective claims * * *.

"RULE 53. In the proceedings aforesaid, the petitioner shall be at liberty to contest his liability, or the liability of said vessel, * * *.

"RULE 54. The said petition shall be filed and the said proceedings had in any district court of the United States in which said vessel has been libeled * * * or, if the said vessel has not been libeled, then in the district court for any district in which the owner has been sued * * *."

BRIEF FOR PETITIONER

Supreme Court of the United States

October Term, 1956

No. 445

LAKE TANKERS CORPORATION,

Petitioner,

against

LILLIAN M. HENN, Admx.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Supreme Court of the United States

October Term, 1956

No. 445

LAKE TANKERS CORPORATION,

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BRIEF FOR PETITIONER

Opinions Below

The first opinion in the District Court, that of RYAN, J., is reported only at 1955 A. M. C. 55. It is at page 21 of the record. The first and second opinions of WEINFELD, J., are reported at 132 F. Supp. 504 and 137 F. Supp. 311.

The first opinion of the Court of Appeals is reported at 232 F. 2d 573 and is at page 57 of the record. Its memorandum inviting additional briefs for the rehearing *in banc* is not reported; it is at page 81 of the record. Its *per curiam* opinion granting the petition for rehearing *in banc* but adhering to its original decision is reported at 235 F. 2d 783 and is at page 82 of the record.

Jurisdiction

The judgment of the Court of Appeals was entered on April 13, 1956 (R. 69). The petition for rehearing *in banc* was granted and the original decision adhered to on August 21, 1956 (R. 82). The petition for certiorari was filed on September 24, 1956 and was granted November 19, 1956. The jurisdiction of this Court rests on 28 U. S. C. § 1245(1).

Question Presented

Is the owner of a tug and barge entitled to maintain a proceeding for limitation of liability and to obtain a *concursus* and one decision, binding upon all parties as to the issues of liability, amount of the limitation fund and the amounts to be recovered by the several claimants, when it is confronted with eleven death, personal injury and loss of property claims, the aggregate of which is greater than the amount of its limitation fund as may be determined after trial?

Statute and Rule Involved

The pertinent portions of the limitation statute,* Title 46 U. S. Code, §§ 183 *et seq.*, are as follows:

> "§ 183(a). The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property * * *, or for any loss, damage, or injury by collision * * * done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

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* The entire statute is printed in the appendix hereto.

Sub-section (b) and the ensuing sub-sections of § 183 provide for the statutory fund of $60 per ton but are limited to "seagoing" vessels and are not applicable here.

> "§ 184. Whenever any such embezzlement, loss, or destruction is suffered * * * and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose * * * the owner of the vessel * * * may take the appropriate proceedings in any court, for the purpose of apportioning the same for which the owner of the vessel may be liable among the parties entitled thereto.
>
> "§ 185. The vessel owner * * * may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the Court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the Court may from time to time fix as necessary to carry out the provisions of § 183 of this title * * *. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

The pertinent sections of the Supreme Court Admiralty Rules,* Title 28, U. S. Code, Rules, are as follows:

> "RULE 51. The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability * * * may file a petition in the proper district court * * *. With his petition the petitioner may, if he so elects, file an interim stipulation, with sufficient sureties or an approved corporate surety, for the

* Rules 51-55 are printed in their entirety in the appendix hereto.

payment into Court whenever the Court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel * * *.

"Upon the filing of such interim stipulation * * * the Court shall issue a monition * * *.

"The said Court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect of any claim or claims subject to limitation in the proceeding.

"RULE 52. * * * Proof of all claims which shall be filed in pursuance of said monition shall thereafter be made before a commissioner * * * and on confirmation of said commissioner's report * * * the moneys paid or secured to be paid into Court as aforesaid * * * shall upon determination of liability be divided pro rata * * * amongst the several claimants in proportion to the amount of their respective claims * * *.

"RULE 53. In the proceedings aforesaid, the petitioner shall be at liberty to contest his liability, or the liability of said vessel, * * *.

"RULE 54. The said petition shall be filed and the said proceedings had in any district court of the United States in which said vessel has been libeled * * * or, if the said vessel has not been libeled, then in the district court for any district in which the owner has been sued * * *."

Statement of Case

Shortly before 1:00 A. M., July 10, 1954, the yacht BLACKSTONE was proceeding south in the Hudson River with eleven men on board, returning to Poughkeepsie from a moonlight excursion to Kingston. Petitioner's tug EASTERN CITIES, push-towing petitioner's barge LTC No. 38, was proceeding up the Hudson River. The BLACKSTONE

ran into the bow of No. 38, capsized and sank. Ten of the eleven persons aboard were rescued by the EASTERN CITIES, but respondent's decedent has not reappeared.

Respondent began an action in the New York Supreme Court, Ulster County, to recover $500,000 damages for the loss of her husband's life. Additional actions at law were brought against petitioner by Clyde W. Roan, owner of the BLACKSTONE, claiming $7,500 for property damage and $25,000 damages for personal injury, by Robert E. Cruz, claiming $25,000 damages for personal injuries, and by John E. Strong and Charles A. Carlson, each of whom claimed $50,000 damages for personal injuries.

The aggregate of these five suits was $657,500 and six of the persons aboard the BLACKSTONE remained to be heard from. The value of the EASTERN CITIES was about $110,000 and the value of No. 38 about $165,000. The pending freight was $8,542.21. Thus petitioner was faced with suits claiming $374,000 more than the value of its interest in the vessels, with six additional suits still to be expected. Accordingly petitioner filed, in the United States District Court for the Southern District of New York, its petition for exoneration from or limitation of liability and claimed the benefit of the Limitation of Liability Statutes, Title 46, U. S. Code, §§ 183(a), 184 and 185. The petition (R. 1) contained the allegations required by Supreme Court Admiralty Rule 51 and, pursuant to that rule, petitioner filed an *interim* stipulation for the payment into court, whenever the court might order, of the value of its interest in the vessel (R. 7). The amount of this *interim* stipulation was $118,542.21, being the value of the EASTERN CITIES plus the pending freight. No. 38 was without power and was wholly controlled by the tug; therefore, it was thought that the EASTERN CITIES was the "vessel" and that a stipulation for her value was enough. *Liverpool, etc. Nav. Co.* v.

Brooklyn Eastern District Terminal, 251 U. S. 48, 53; *The Transfer No. 21*, 248 Fed. 459, 461 (2 Cir.). However, petitioner, in its petition, avowed its readiness and willingness to give a stipulation for the payment into court of the value of "such additional interest as may be appropriate whenever the same shall be ordered" (R. 4).

The *interim* stipulation for the value of the EASTERN CITIES was approved by the Court and the Court, pursuant to the third paragraph of Supreme Court Admiralty Rule 51, thereupon issued its monition against all persons asserting claims in respect of which the petitioner sought limitation, citing them to file their claims in the limitation proceeding. Pursuant to the final paragraph of Supreme Court Admiralty Rule 51, the District Court also issued its order restraining all persons from prosecuting claims arising out of the collision elsewhere than in the limitation proceeding (R. 10).

Respondent then appeared specially and moved to dismiss the petition on the asserted ground that the *interim* stipulation was inadequate because it did not include the value of No. 38. The District Court, Ryan, J., granted the motion because there was a separate claim of negligence on the part of No. 38 and required petitioner to give an additional stipulation for her value. Petitioner promptly filed an additional *interim* stipulation for $165,000 and petitioner raises no question here as to the propriety of that requirement.

Thereafter, respondent filed her claim in the limitation proceeding for $250,000, one-half the amount sued for in the State Court action, although that action remained, and still remains, pending without reduction in the *ad damnum*. Each of the ten survivors filed separate claims for personal injuries and for property damage, the aggregate of these being, as filed in the limitation proceeding, $9,525. The

total of all claims filed in the limitation proceeding was, therefore, $259,525. This total exceeded the value of the EASTERN CITIES and exceeded the value of No. 38, but was less than the aggregate value of both.

In this posture, respondent moved to vacate the restraining order so that she might proceed with her action at law, asserting that the claims aggregated less than petitioner's limitation fund. She relied upon *Petition of Texas Company*, 213 F. 2d 479 (2 Cir.); *certiorari denied* 348 U. S. 829. Her argument was that the limitation fund was $283,542.21, the sum of the two *interim* stipulations and, because the claims were only $259,525, petitioner needed no *concursus* because the fund was adequate to pay all in full. However, respondent confused the amount of the eventual limitation fund with the sum of the *interim* stipulations, which were no more than security for the eventual fund and WEINFELD, J. denied the motion, holding that the amount of the fund could not be determined until after trial because the fund will consist of the value only of the vessel(s) at fault *in rem*. This is settled law. *Liverpool, etc. Nav. Co.* v. *Brooklyn Eastern District Terminal*, 251 U. S. 48; *The Transfer No. 21*, 248 Fed. 459 (C. A. 2); *Standard Dredging Co.* v. *Kristiansen*, 67 F. 2d 548 (C. A. 2), *certiorari denied* 290 U. S. 704; *Harbor Towing Corp.* v. *Atlantic Mutual Insurance Co.*, 189 F. 2d 409 (C. A. 4). The Judge therefore held that the premise underlying respondent's motion was false and denied the motion. *Petition of Lake Tankers Corporation*, 132 F. Supp. 504 (R. 42). However, in his opinion the Judge suggested that respondent could escape the restraining order and the *concursus* of the limitation proceeding if she would apportion her claim against tug and barge and bring the amounts of the claims against each vessel to a sum less than its value. Respondent followed this suggestion and filed a stipulation stating her claim against tug and barge in separate amounts, but her claim against petitioner re-

mained the same, viz. $250,000. The claims were then, and still are, as follows:

Respondent.	*In this proceeding*	*In pending actions at law*
allocated to tug	$100,000	
allocated to barge	150,000	
against petitioner	250,000	$500,000
Not allocated as between tug and barge:		
Roan	4,400	32,500
Carlson	3,000	50,000
Cruz	225	25,000
Strong	1,600	50,000
Van Wart	50	
Hughes	50	
McNutt	50	
Raymond	50	
Cady	50	
Ratledge	50	
Total	$259,525	$657,500

Thus the aggregate of claims against petitioner in this proceeding remained $259,525. The eventual limitation fund, as distinguished from the *interim* security, will exceed the claims only if both vessels are held at fault. If only one is held at fault the fund will not be adequate and a concourse will be necessary to distribute it pro rata. Whether either vessel was at fault, or whether both were, cannot be determined until after trial.

Whether or not the fund proves to be adequate, the eleven claims against petitioner arise out of the same occurrence and turn upon the same facts and law. A concourse will permit their decision in one proceeding the result of which will be binding upon them vis-a-vis peti-

tioner, and also among themselves. The latter is an essential consideration if the fund should be inadequate.

Nevertheless, after apportioning her claim, respondent again moved to vacate the restraining order, this time on the ground that the claims against each vessel were less than its value. Weinfeld, J., granted this motion, holding that there are two funds, each more than the claims against it. *Petition of Lake Tankers Corporation*, 137 F. Supp. 311.

On appeal a divided Court affirmed, holding that concourse will be granted only when necessary to distribute an inadequate fund, that this single proceeding, by a single petitioner, must be regarded as if it were two separate proceedings because two vessels are involved, and that, since the claims allocated to each vessel are less than its value, respondent can not be held in the concourse of the limitation proceeding (R. 57).

In a strong dissent, Hincks, C. J., held that this single proceeding, by a single petitioner, cannot be regarded as if it were two; that since the claims against petitioner exceed the possible fund the Admiralty Court must keep them all in limitation proceeding and that the prosecution of respondent's action at law will be "wholly fruitless and nugatory" (R. 66).

Petitioner filed a petition for a re-hearing *in banc*. After four months the Court filed its *per curiam* opinion granting the petition for re-hearing *in banc* but adhering to its original decision. No reasons for the decision were stated. Judges Clark, Frank, Lumbard and Waterman concurred; Judges Medina and Hincks dissented (R. 82).

Summary of Argument

The limitation proceeding was properly brought. The Admiralty Court acquired full jurisdiction, and the prosecution of claims in the State Court actions was properly enjoined, because the aggregate of the several claims exceeded the value of petitioner's interest in its vessels. The Court's jurisdiction, properly acquired and taken, is not subject to defeasance at the whim of claimants' counsel by reducing or purporting to allocate the claims. Despite these maneuverings the claims still exceed the possible amount of the fund and petitioner is entitled to a *concursus* for their disposition.

ARGUMENT

I. Upon the filing of the petition the District Court acquired jurisdiction of the proceeding.

In *Norwich Company* v. *Wright*, 13 Wall. 104, this Court recognized the need for rules to guide the shipowner in seeking the protection of the Limitation Statutes, which contain no procedural provisions, and coincident with that decision promulgated the Rules (*supra*, pp. 3-4; *infra* pp. 44-50).

Rule 51 of the Supreme Court Admiralty Rules does not condition the Court's jurisdiction of a limitation petition upon an allegation that the claims exceed the value of the petitioner's interest in the vessel. Rule 51 specifies what allegations must be made and requires that "the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort, arising on that voyage" be stated. It also provides for an ex-parte *interim* appraisal of the value of the petitioner's interest in the vessel, etc., or alternatively for the transfer of the petitioner's interest

to a trustee. In its third paragraph Rule 51 provides that upon the filing of an *interim* stipulation or a surrender to a trustee "the court shall issue a monition. . . . . " and in its last paragraph Rule 51 provides that upon the application of the petitioner the Court shall restrain the further prosecution of all claims except in the limitation proceeding. The rule contains no requirement that the claims exceed the fund in fact or that the petitioner so allege.

The same is true of the statute. Title 46 U. S. Code, Section 185, as amended in 1936, provides that the shipowner may file his petition within 6 months after a claimant shall have given written notice of claim. It does not require that the amount claimed exceed the value of the petitioner's interest in the vessel. Section 185 further provides that the petitioner, having filed his petition and given the required security, may have an order directing that "all claims and proceedings against the owner with respect to the matter in question shall cease".

It cannot be denied that neither the statute nor the rules require that the claims exceed the fund, or that petitioner so allege, before the Court can take jurisdiction.

In this case, however, actions had been begun against petitioner claiming an aggregate of $657,500 before the petition was filed and the value of the petitioner's interest in the two vessels was not more than $283,500. If there were a requirement that the claims exceed the value of the vessel(s) it was obviously met.

II. Jurisdiction once obtained is not lost by reducing the claims to an amount less than the fund.

In *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, this Court, over 70 years ago, held that juris-

diction once obtained should be kept to a final determination of the whole dispute. The Court said:

> "* * * after proceedings have been commenced in the proper District Court in pursuance thereof, the prosecution pari passu of distinct suits in different courts, or even in the same court by separate claimants, against the shipowners, is, and must necessarily be, utterly repugnant to such proceedings and subversive of their object and purpose" (p. 594).
>
> "Proceedings, under the act having been duly instituted in this court, it acquired full jurisdiction of the subject-matter; and having taken such jurisdiction, and procured control of the vessel and freight (or their value), constituting the fund to be distributed, and issued its monition to all parties to appear and present their claims, it became the duty of all courts before which any of such claims were prosecuted, upon being properly certified of the proceedings, to suspend further action upon said claims" (p. 599).

In *In re Morrison*, 147 U. S. 14, this Court said:

> "The filing of the libel and petition of the steamship company, with the offer to give a stipulation, conferred jurisdiction upon the court, and no subsequent irregularity in procedure could take away such jurisdiction" (p. 34).

In *The San Pedro*, 223 U. S. 365, this Court recited that there had been due appraisment of the value of the owner's interest, that a proper stipulation for value had been given and that a monition had thereupon duly issued. This, the Court said, cemented the jurisdiction of the District Court:

> "In that situation, the jurisdiction of the court to hear and determine every claim in that proceeding became exclusive. It was then the duty of every

other court, Federal or state, to stop all further proceedings in separate suits upon claims to which the limited liability act applied" (p. 372).

In *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, this Court said:

> "The jurisdiction of the admiralty court attaches in rem and in personam by reason of the custody of the res put by the petitioner into its hands. The court of admiralty, in working out its jurisdiction, acquires the right to marshal all claims, whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the res and by judgment in personam against the owners, so far as the court may decree * * *" (pp. 217-8).

In *Anderson* v. *Alaska S.S. Co.*, 22 F. 2d 532 (9 Cir.), the Court said:

> "Nor is it material that the aggregate amount of the claims presented was less than the appraised value, because the right of limitation *depends on the probable amount of the claims against the vessel at the date of filing the petition*, not on the amount of the claims subsequently filed or allowed" (p. 534, italics ours).

The John K. Gilkinson, 150 Fed. 454, and 156 Fed. 868; *The Tolchester*, 42 Fed. 180; *The Garden City*, 26 Fed. 766, and *Briggs* v. *Day*, 21 Fed. 727, are to the same effect.

Analogy of the Diversity Cases.

The analogy between the present case and those arising under Section 1331 of Title 28, U. S. Code, is strong. The jurisdictional amount is $3,000. This Court has flatly held that the jurisdiction of the District Court attaches upon the allegation, in good faith, that more than $3,000 is involved

and may not be defeated by a subsequent reduction in the amount of the claim. In *St. Paul Mercury Indemnity Company* v. *Red Cab Company*, 303 U. S. 283, this Court said:

> "And though, as here, the plaintiff after removal, by stipulation, by affidavit, or by amendment of his pleadings, reduces the claim below the requisite amount, this does not deprive the District Court of jurisdiction.
>
> "Thus events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the District Court's jurisdiction once it has attached" (pp. 292-3).

The Court continued:

> "We think this well established rule is supported by ample reason. If the plaintiff could, no matter how *bona fide* his original claim in the state court, reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election" (p. 294).

Compare *McDonald* v. *Patton*, 240 F. 2d 424 (4 Cir.).

These precepts apply with full force here. Petitioner, confronted with five suits for sums that aggregated $374,000 more than the value of its two vessels, in good faith filed its petition seeking limitation of liability and a *concursus*. Respondent, who sued for $300,000 in the State Court, filed her claim in this proceeding for half that, $250,000, and

Roan, Carlson, Cruz and Strong, who had sued for an aggregate of $157,500 in their State Court actions, filed claims in this proceeding for only $8,225. The six others filed claims for only $50 each in this proceeding. This brought the aggregate to $259,525, just below the value of petitioner's two vessels and the pending freight, $283,500. Obviously these reductions were made by claimants acting in concert for the very purpose of questioning the Admiralty jurisdiction.

It is not for them to say that the amounts of their claims as originally filed were not stated in good faith. There is no reason why jurisdiction of a limitation proceeding should depend on the claimants' caprice.

III. *Concursus* is not contingent upon the existence of an inadequate fund.

The existence of several claims arising out of the same maritime accident or disaster is alone enough to give the Admiralty Court jurisdiction to bring all the parties into concourse and determine all the rights and liabilities in one proceeding. This Court has said many times that one of the purposes of the Act was to bring all the parties into concourse and that the proceeding is analogous to an equity proceeding to enjoin a multiplicity of suits.

In *Maryland Casualty Co. v. Cushing*, 347 U. S. 409, Mr. Justice Frankfurter assigned two reasons for concluding that the Louisiana statute permitting direct suits against liability underwriters could not apply to maritime policies. His *first* was that it encroached "upon the federal statutory system for bringing all claims into concourse" (p. 417). It was only as his *second* reason that he mentioned that the limited liability feature of the Act might

be frustrated if the Louisiana statute were sustained. This clearly points up the dual purpose of the Act as this Court has uniformly construed it: (1) to bring claims into concourse and, (2) to limit the shipowner's liability to the value of his interest in his vessel. At pages 414-17 Mr. Justice Frankfurter reviewed the 1936 amendments to the Act, quoted at length from the Congressional hearings and from earlier decisions as to its purpose and said:

> "The heart of this system is a *concursus* of all claims to ensure the prompt and economical disposition of controversies in which there are often a multitude of claimants" (p. 415).

In *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co., supra*, 273 U. S. 207, Mr. Chief Justice Taft emphasized the importance of a *concursus* and said:

> "The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader, and a creditors bill. It looks to a complete and just disposition of a many cornered controversy, * * *" (p. 216).

In *Butler* v. *Boston Steamship Co.*, 130 U. S. 527, Mr. Justice Bradley, who probably had more to do with the early delineation of the meaning of the Act than any other Justice of the Court, referred to

> "The beneficent object of the law in enabling the ship owner to bring all parties into concourse who have claims arising out of the disaster or loss, and thus to prevent a multiplicity of actions, * * *" (p. 552).

In *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co., supra*, 109 U. S. 578, Mr. Justice Bradley earlier wrote:

> "The inconveniences that may arise from preventing or arresting the prosecution of separate suits

> by the claimants are no greater in this case than in the case where proceedings at law are arrested for the purpose of having an investigation in a court of equity, or where distinct and separate suits are restrained for the purpose of settling a common controversy in a single proceeding, as in the case of bills for preventing a multiplicity of suits, and in cases of bankruptcy" (p. 596).

See also *The Scotland, supra*, 105 U. S. 24, 33; *Ex parte Slayton*, 105 U. S. 451, 452; and *Just* v. *Chambers, supra*, 312 U. S. 383, 385-6.

There are five situations in which the shipowner may invoke the Act without an "inadequate fund":

(1) where there is no liability;

(2) where there is liability without limitation;

(3) where there is liability with the right to limit but nothing of value remains of the vessel and there is no freight or passage money;

(4) where there is liability with the right to limit but the fund exceeds the proved claims, and

(5) where, as in this case, after the filing of the petition and the claims it is made to appear that the claims are less than the value of petitioner's interest in the vessel.

As shown below, in the first four situations it is established that the courts will take jurisdiction of the limitation proceeding although there is no need for a concourse to distribute an inadequate fund.

1. No Liability.

Supreme Court Admiralty Rule 53 expressly provides that the petitioner shall be at liberty to contest his liability—as appellant does here (R. 4). The shipowner's denial of liability does not divest the Court of jurisdiction.

In *Butler* v. *Boston S.S. Co., supra*, 130 U. S. 527, Mr. Justice Bradley wrote:

> "Allegations that the owners themselves were in fault cannot affect the jurisdiction of the court to entertain a cause of limited liability, *for that is one of the principal issues to be tried in such a cause*" (p. 552; italics ours).

Obviously if the petitioner may contest his liability it is possible that there may be no liability and therefore no occasion to distribute any fund, adequate or inadequate. Nevertheless petitioner can compel the claimants to come into concourse for a determination of the question of liability in a single proceeding.

In *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co., supra*, 273 U. S. 207, this Court stated the order of proof at the trial of a limitation proceeding, viz.:

> "* * * it shall be determined, first, whether the owner and his vessel are liable at all; second, whether the owner may avoid all liability except that of the vessel and pending freight; third, what the amount of the just claims are, and, fourth, how the fund in court should be divided between claimants" (p. 215).

Inasmuch as there may be no liability, it is quite possible that the claimants may be turned away without the distribution of any fund. Yet they will have been compelled to come into concourse on the question of liability. Plainly, therefore, this is one situation where the existence of an inadequate fund is not essential to the Court's jurisdiction. There is no need to determine "what the amount of the just claims are" until after the question of liability has been decided.

2. No Limitation.

The District Court, having tried the case and held that the petitioner is liable without limitation, not only has the *power* but the *duty* to keep jurisdiction and settle the controversy in its entirety. *Hartford Accident Co.* v. *Southern Pacific Co., supra*, 273 U. S. 207; *Just* v. *Chambers*, 312 U. S. 383; *Spencer Kellogg Co.* v. *Hicks*, 285 U. S. 502.

This, therefore, is another situation which shows that an inadequate fund is not necessary to a *concursus*.

3. No Fund.

In *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co., supra*, 109 U. S. 578, this Court assumed a situation where the vessel was totally lost and there was no freight money *i.e.*, no fund at all, and considered whether a petition would lie on those facts. The argument was that no petition would lie because, there being no fund, the vessel owner had no need to bring the claimants into concourse to distribute it. This Court held that nevertheless a petition would lie.

To like effect, in *Petition of Wood*, 124 F. Supp. 540, the petition alleged that the vessel was a total loss and that there was no pending freight or any limitation fund. A motion was made to dismiss the petition, or in the alternative to allow the claimants to pursue their common law remedies, because there was no fund for distribution. Judge Goddard denied the motion, holding that the existence of an inadequate fund is not a prerequisite to the maintenance of a limitation proceeding.

4. Adequate Fund.

Where, after trial, petitioner is held liable and is granted the right of limitation but the proved claims are less than the fund, the petition is not dismissed; rather the claimants

are paid in full and the balance is repaid to the petitioner. *Briggs* v. *Day*, 21 Fed. 727.

The foregoing review of the possible situations abundantly establishes that limitation petitions may not properly be restricted to the situations where the fund is not sufficient. Jurisdiction has been taken and retained in four of the possible situations where there is not an inadequate fund. The same reasons exist for retaining jurisdiction in this case because of the eleven claims arising out of the one collision and sinking. The similarity of the limitation procedure to the Bills of Peace in equity to prevent multiplicity of actions in striking and has not been ignored. See Chafee, *Bills of Peace With Multiple Parties*, 45 Harv. L. Rev. 1297, 1312 (1932). *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 216; *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 596.

The liberal third party practice under the Supreme Court Admiralty Rule 56 also looks to the disposition of many claims in one action. *Munson Inland Lines Inc.* v. *Insurance Co. of North America*, 36 F. 2d 269 (S. D. N. Y. 1929); *British Transport Comm's* v. *United States*, 230 F. 2d 139 (4th Cir.) cert. granted 352 U. S. 821, No. 247; see *Note* 66, Yale L. J. 121 (1956). *Concursus* has only been denied by the Second Circuit and the "rule" there is now discussed.

Second Circuit Cases.

The Court below relied principally upon its own decision in *Petition of Texas Co.*, 212 F. 2d 479, C. A. 2, cert. den. 348 U. S. 829. In that case the claims originally made exceeded the fund but, as in the case at bar, the claimants in concert reduced their claims to an aggregate less than the fund for the transparent purpose of avoiding the limitation proceeding. The Court held that a limitation

proceeding can be sustained only where there is need to distribute an inadequate fund.

The Court put considerable emphasis on the provision in Title 46, U. S. Code, Section 184 that the owner of the vessel may take appropriate proceedings "for the purpose of apportioning the sum" *i.e.* the fund, among the parties entitled thereto. Section 184 has remained untouched since 1877. However, Section 185 of Title 46, U. S. Code was amended in 1936 and provides that

> "The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for a limitation of liability within the provisions of this chapter * * *."

Nothing is said in Section 185, as amended in 1936, about apportioning any fund. But the significance attached by the Court to the words of Section 184 was misplaced because Section 185 permits the filing of a petition where there has been no more than written notice of one claim, and there is no requirement that that claim, or the aggregate of the potential claims, exceed the prospective limitation fund.

In view of the six months' requirement of Section 185 the Second Circuit's "rule" could easily deprive a shipowner, otherwise entitled, of the benefit of the statute. Suppose a disaster involving numerous injuries and losses of life, that two claims are filed immediately, but that, deliberately or otherwise, the others are withheld until more than six months have gone by. If the two claims are less than the fund a proceeding for limitation brought within the six months might be dismissed. On the other hand, no proceeding brought after the passage of six months could be sustained because of the provisions of Section 185.

The great bulk of authorities on the question does not seem to have had the Court's attention in *Petition of Texas Co.* The Court cited four cases to support its view. *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.*, 159 F. 2d 273, C. C. A. 2; *Petition of Moran Trans. Corp.*, 185 F. 2d 386 C. A. 2; *Petition of Red Star Barge Line, Inc.*, 160 F. 2d 436, C. C. A. 2 and *The Aquitania*, 14 F. 2d 456, aff'd 20 F. 2d 457 C. C. A. 2.

Two of these cases, *Petition of Moran Trans. Corp.* and *Petition of Red Star Barge Line, Inc.*, were cases where only one possible claim was involved. Single claim cases seem to have little bearing on a case such as this where 11 claims were filed. Such cases are discussed *infra*, pages 25-27.

Curtis Bay Towing Co. v. *Tug Kevin Moran, Inc.* and *The Aquitania* may be discussed together because both involved situations, decidedly different from the present one, where it was *apparent when the petition was filed* that the aggregate of the claims could not even approach the amount of the fund and where it might be said that the petitions were improvidently filed, possibly not in good faith. In the *Curtis Bay* case the value of the petitioner's tug *i.e.* the fund, was $209,000, yet when the petition was filed six months later the amount of the damage was known and it was apparent that it did not exceed $17,000. Meantime suits had been begun in Pennsylvania and it seems to be suggested in the opinion that the petition may have been filed as much to bring the litigation to New York as for any other purpose. The Court by L. Hand, C. J., stated the position for which we contend, *viz.*

> "It is true that limitation proceedings are not merely auxiliaries to the distribution of an inadequate fund among a number of claimants" (p. 275)

but, relying solely upon *The Aquitania*, and apparently without reviewing the great body of authority to the contrary, directed that the restraining order be vacated.

The Aquitania first came before A. N. Hand, then D. J., on a motion to dismiss where the moving parties were less inhibited in stating their ground than were the moving parties in the *Curtis Bay* case, *id.* "that the limitation proceeding is not taken in good faith, because there can be no possible occasion for limiting liability when the claims are so far less than the property to be surrendered" (p. 457). The *Aquitania* had sunk a fishing boat about the size of one of her own life boats. Her owner filed an *interim* stipulation in the amount of $9,225,000. Actions for the deaths of five men who were the crew of the fishing boat had been brought in the aggregate amount of $205,000. Judge Hand considered it significant that the surety on the *interim* stipulation had been allowed by the Federal Treasury and the State Insurance Department to furnish a bond in the amount of $9,225,000 upon the assurance that the liability did not exceed $311,000. In this case some, but by no means all, of the earlier authorities were referred to and the Judge, despite the tremendous disparity between the fund and the aggregate of the claims, refused to grant the motion because the petition was in proper form and the matter relied upon could be set up by answer. However, he referred the matter to a special commissioner to determine whether the claims could possibly equal the fund.

The commissioner reported that the claims could not exceed $210,000 whereupon the Court reaffirmed its earlier view that the statute applies, and it is proper to file a petition, only where there is at least some chance that the claims will exceed the fund. *Petition of Cunard S. S. Co. Ltd.*, 17 F. 2d 120. On appeal the Court affirmed on the same ground. *The Aquitania*, 20 F. 2d 457, C. C. A. 2.

Reflection will make it clear that *The Aquitania* and the *Curtis Bay* cases represent a rule not applicable here. In both cases the propriety of the petition was attacked at the threshold by motion to determine whether the petitions had been filed in good faith. The rule for which those

cases stand may perhaps be stated thus: Where the petitioner at the time of filing the petition knows that the aggregate of all claims cannot possibly equal the value of his interest in the vessel, it will be considered that he does not file in good faith and jurisdiction does not attach. That is a vastly different situation from the one at bar where there can be no doubt that the petitioner in good faith feared that the claims would exceed the fund. Perhaps in the last analysis it can be said that the attaching of jurisdiction depends upon whether or not petitioner seeks the benefit of the statute in good faith. If he does not, *i.e.* if it is reasonably apparent when the petition is filed that the claims cannot exceed the fund, jurisdiction never attaches but if, when the petition is filed, petitioner reasonably and in good faith fears that the aggregate of the claims will exceed the fund, jurisdiction does attach and, once attaching, persists until the entire controversy has been disposed of. Any other result would place the Court's jurisdiction at the whim of the claimant's attorneys, an unseemly situation. The claimants here, by concert, have arbitrarily reduced their claims to just below the maximum limitation fund for the purpose of depriving the Admiralty Court of jurisdiction; in fact the stipulation reducing the claims was presented (and obviously procured) by respondent's attorney. Such maneuvering was not allowed in *Petition of Boraks*, 142 F. Supp. 364.

This is substantially the rule in the diversity cases. In *St. Paul Mercury Indemnity Co.* v. *Red Cab Company*, *supra*, 303 U. S. 283, this Court squarely held that if the claim of jurisdictional amount is "apparently made in good faith" and not "colorable for the purpose of conferring jurisdiction", the amount stated in the complaint is conclusive and "Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction" (pp. 288-90). This is a reasonable and workable rule and is

consistent with all the authorities from *Norwich Company* v. *Wright*, *supra*, 13 Wall. 104, decided in 1872, down to *Petition of Texas Company*, *supra*, 213 F. 2d 479, decided in 1954.

In *Norwich Company* v. *Wright*, *supra*, 13 Wall. 104, this Court held that it was enough that it was

> "* * * * alleged by the libellants [petitioners] that the damage to the schooner and her cargo, together with the damage arising from the loss of the steamer's cargo, greatly exceeds the value of the steamer and her freight for the voyage" (p. 122).

In *The Scotland*, *supra*, 105 U. S. 24, this Court held that the rules were intended to permit the filing of a limitation petition "where they [shipowners] were entitled, *or conceived themselves entitled*, to the law of limited responsibility" (p. 33; italics ours).

Single Claim Cases.

Cases involving only one claim, where no other claim is reasonably possible, are something of an exception to the general rule. Even as to such cases, where there is no need for concourse because there is only one claim, there is no doubt whatever that a limitation proceeding may be brought and will be sustained. *White* v. *Island Transportation Company*, 233 U. S. 346.

The only real difference between single claim cases and multiple claim cases is that in the former the claimant may, in the discretion of the Court, be allowed to proceed to establish liability and the amount of his claim outside the limitation proceeding provided he concedes the vessel owner's right to limitation of liability. In *Langnes* v. *Green*, 282 U. S. 531, Green sued Langnes in the State Court to recover for injuries sustained on the latter's vessel. On the eve of trial Langnes began a limitation proceeding and the District Court issued an order restrain-

ing the prosecution of the State Court action. Green moved to dissolve the restraining order on the ground that the State Court had jurisdiction because there was only one possible claim. This motion was denied and the limitation proceeding went to trial. The Court held that there was no liability and did not reach the question of the right to limitation of liability. Green appealed; the Circuit Court reversed and directed the District Court to dismiss the limitation proceeding for want of jurisdiction. This Court dealt primarily with Green's claim that the shipowner should have sought his limitation by proper pleading in the State Court action because there was only one claim.

This Court questioned whether the petition had been filed in good faith because, in view of the nature of the accident, it seemed that there could not possibly be any other claimant (p. 540). Nevertheless the Court held that the vessel owner was entitled to invoke the limitation act and that the question whether the action at law should be allowed to proceed was one of sound judicial discretion and not a matter of right on the part of the single claimant (pp. 540-1).

The Court remanded the case with directions to allow Green to proceed with the State Court action upon condition that he concede Langnes' right to limitation. Upon the remand Green refused to concede Langnes' right to limit and the District Court refused to modify the restraining order. Thereupon Green moved in this Court for leave to file a petition for writ of mandamus against the District Court to show cause why he should not be allowed to proceed in the State Court. *Ex parte Green*, 286 U. S. 437. This Court maintained its earlier view, held that the District Court was right in refusing to vacate the restraining order while the right to limitation of liabilty was in issue, and denied Green's motion. The Court said:

> "It is clear from our opinion that the State Court has no jurisdiction to determine the question of the

> owner's right to a limited liability, and that if the value of the vessel be not accepted as the limit of the owner's liability, the Federal Court is authorized to resume jurisdiction *and dispose of the whole case*" (pp. 439-440, italics ours).

There is nothing in *Langnes* v. *Green*, or the single claim cases that follow it, that conflicts with the points previously made in this brief.

The fundamental distinction between the single claim and the multiple claim cases is that no concourse is necessary to avoid a multiplicity of trials either on the question of liability or on the question of limitation. Obviously there is no analogy between the single claim case and this one where there are eleven claimants either in or trying to get out of the limitation proceeding. *Concursus* here is required.

IV. The claims in this proceeding exceed the amount of the possible fund and petitioner is entitled to a *concursus* for their disposition.

There is no doubt that where the claims number more than one and exceed the limitation fund petitioner has an absolute right under the statute and decisions of all courts to bring all claims against it into concourse so that the Admiralty Court may, if liability is decreed, distribute an inadequate fund. Even the "rule" evolved in the Second Circuit requires that the aggregate of claims must be *substantially* less than the fund before the restraining order will be relaxed. *Petition of Trinidad Corporation*, 229 F. 2d 423 (2d Cir.); *George J. Waldie Towing Co.* v. *Ricca*, 227 F. 2d 900 (2d Cir.); *Petition of Texas Company*, 213 F. 2d 479 (2d Cir.); *Curtis Bay Touring Co.* v. *Tug Kevin Moran Inc.*, 159 F. 2d 273 (2d Cir.); *Petition of Moran Transportation Corp.*, 185 F. 2d 386 (2d Cir.).

In *Petition of Trinidad Corporation* the claims were less than the fund but not by a margin large enough to satisfy the Court and it refused to relax the restraining order.

In this proceeding the claims aggregate $259,525. But it cannot be said whether the amount of the limitation fund will be $118,500 (tug's value) or $165,000 (barge's value) or $283,000 (value of both) until after there has been a trial on the merits for this reason: Petitioner owned both tug and barge, valued at $118,500 and $165,000 respectively. The limitation fund will consist of the value of only the vessel or vessels individually at fault *in rem*. *Liverpool etc. Nav. Co. v. Brooklyn Eastern District Terminal*, 251 U. S. 48; *The Transfer No. 21*, 248 Fed. 459 (2 Cir.); *Standard Dredging Co.* v. *Kristiansen*, 67 F. 2d 548 (2 Cir.), certiorari denied 290 U. S. 704; *Harbor Towing Corp.* v. *Atlantic Mutual Ins. Co.*, 189 F. 2d 409 (4 Cir.).

The *in rem* liability of a vessel can only be determined by an admiralty court. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *The Moses Taylor*, 4 Wall. (71 U. S.) 411; *The Hine* v. *Trevor*, 4 Wall. (71 U. S.) 555; *The Glide*, 167 U. S. 606; *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109.

Since the amount of the fund cannot be determined until after trial it is not presently possible to say that the fund will exceed the claims and that no concourse will be necessary to distribute an inadequate fund. Obviously, therefore, the decision allowing respondent to proceed in the state court is a complete departure even from the "rule" recently evolved in the Second Circuit.

It is no answer to say that the claims as against the tug have been reduced to an aggregate less than her value and the claims against the barge similarly reduced. By apportioning her claim as between tug and barge respondent does no more than engage not to claim the value of

the barge if the barge is held without fault, or the value of the tug if the tug is held blameless. But this is no concession whatever because it is settled law that if the barge is not individually at fault *in rem* petitioner need not surrender her value; and similarly as to the tug (*supra*, p. 28).

Moreover, the statute deals with claims against the owner, not the vessels themselves.

Section 183(a) says that "The liability *of the owner* * * * shall not * * * exceed the amount or value of the interest of such owner in such vessel * * *."

Section 184 says that the claimants "shall receive compensation *from the owner*" and that it is "the *owner* of the vessel" who "may take appropriate proceedings in any court * * *."

Section 185 says that "*The vessel owner* * * * may petition a district court * * * for limitation of liability" (italics ours).

Since the statute so plainly deals with the liability of the *owner*, and the *owner's* right to bring proceedings to limit that liability, it is patently idle to consider respondent's engagement not to collect any ultimate judgment from the barge if it is held blameless, or from the tug if it is held blameless. She could collect from neither in any event for she has not sued either; nor need she, for petitioner has given adequate bond to pay proved claims up to the value of whichever one, or both, is to be the measure of its liability—if such is decreed.

Claims which respondent asserts are against petitioner's inanimate property, tug and barge, are in truth and in fact claims against petitioner itself, the only juristic person seeking limitation of liability arising out of this collision. The undeniable fact is that, whether allocated to the tug or the barge, or any other piece of petitioner's property, the eleven claims aggregate $259,500. If proved, they will be

paid by petitioner out of its general funds in amounts which substantially exceed the amount at which the limitation fund may be fixed. Therefore it cannot now be said that the fund will be adequate, or that there will be no need to distribute an inadequate fund; hence, even under the Second Circuit "rule", petitioner is entitled to assert its statutory right in this proceeding and to hold respondent and the other claimants therein for the disposition of the entire matter.

A. This Single Proceeding Need Not Be Regarded As If It Were Two.

The foundation upon which the decision of the majority below rests is that they "must" regard this single proceeding as if it were two (R. 61). The language of the statute, Title 46 U. S. Code §§ 183-188, does not impose the constraint felt by the majority and its opinion does not rely upon the statute. The same is true of the Supreme Court Rules, Admiralty Rules 51-54, Title 28 U. S. Code, Rules, which spell out the procedure with considerable particularity. The majority opinion does not rely upon the rules.

The decision of the majority is unprecedented. No prior decision imposes the constraint felt by the majority and it cites none. There are numerous cases in which the courts have dealt with limitation petitions by the owner of two or more vessels without feeling any constraint or embarrassment because separate petitions could have been filed. And this is true both in cases where the value of the second vessel has not been surrendered originally as well as in cases where security has been given for the second vessel but she has not been held liable. *United States v. The Australia Star*, 172 F. 2d 472 (2 Cir.); *Standard Dredging Co. v. Kristiansen*, 67 F. 2d 548 (2 Cir.); *The Transfer No. 21*, 248 Fed. 459 (2 Cir.); *The Bordentown*, 40 Fed. 682 (S. D. N. Y.); *The Captain Jack*, 169 Fed. 455 (D. C. Conn.); *The Alvah H. Boushell*, 38 F. 2d 890 (4

Cir.); *Thompson Towing & Wrecking Ass'n* v. *McGregor*, 207 Fed. 209 (6 Cir.); *The Columbia*, 73 Fed. 226 (9 Cir.).

Moreover, where the owner of two vessels has sought to obtain limitation but surrendered the value of only one, and where, after trial, the courts have found that faults of both contributed, they have not, in any instance we can find, directed that a separate proceeding be begun. On the contrary, they have either ordered that the value of the second vessel be brought into the pending, single proceeding, *United States* v. *Australia Star*, *supra*, 172 F. 2d 472 (2 Cir.); *The Alvah H. Boushell*, *supra*, 38 F. 2d 890 (4 Cir.), or they have dismissed the proceeding entirely. *The San Rafael*, 141 Fed. 270 (9 Cir.).

The reason advanced by the majority for feeling the constraint upon which its decision is based is that the owner "could have" instituted separate proceedings in respect of each vessel, from which it concludes that "The owner can not enlarge its rights under the statute by the mere expedient of coupling the two proceedings" (R. 61). The worst that can be said for petitioner's position is that it had the option to begin a single, or two, proceedings. It exercised its option and began one. That was the exercise of a clear right under the statute and the rules and such advantages as it may gain from the exercise of its right can not justly be taken away. But there is no question of any enlargement of petitioner's rights. It has the unquestioned right under the statute to petition for limitation of liability and it seeks, if held liable at all, only to do what the statute permits it to do in a proper case, viz. limit its liability to the value of its interest in the vessel or vessels at fault. A solution of the problem is not advanced by referring to the filing of a single petition as a "mere expedient".

Without compulsion by statute, rule or precedent, and with the slenderest of reasons, the majority below has laid

down a rule that will largely emasculate the statute where two or more vessels of single ownership are involved. The majority's approach to statutory construction is diametrically contrary to the instructions given by this Court to the lower courts. Uniformly and over a period of 75 years the Court has declared that the statute is to be construed liberally and not grudgingly for the benefit of shipowners. *Norwich Company* v. *Wright*, 13 Wall 104, 121; *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 588-9; *Butler* v. *Boston Steamship Co.*, 130 U. S. 527, 550-1; *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 214-16; *Flink* v. *Paladini*, 279 U. S. 59, 62-3; *Larsen* v. *Northland Transportation Co.*, 292 U. S. 20, 24; *Just* v. *Chambers*, 312 U. S. 383, 385; *Coryell* v. *Phipps*, 317 U. S. 406, 411; *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 414.

This Court has held that the statute itself is only an outline of the plan intended by Congress for the benefit of shipowners and that its full breadth and scope were left to be prescribed by judicial authority. *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, *supra*, 109 U. S. 578, 590. And this Court has, over the span of almost a century, consistently adopted a broad rather than a restrictive interpretation of the statute. As the Court pointed out in *Butler* v. *Boston Steamship Co.*, *supra*, 130 U. S. 527, 550, it was at first contended that the Act did not apply to collisions but this "pretence" was rejected in *Norwich Company* v. *Wright*, 13 Wall 104; and it was next insisted that the Act did not extend to loss by fire, but this restrictive view was rejected in *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578. In the *Butler* case the claim was that the Act did not extend to claims for personal injury and death, but again the Court rejected the narrow construction. In 1881 the Court held that, although the Act did not so provide expressly, it could be invoked by a British shipowner in the case of a collision on the high

seas between his vessel and an American vessel. *The Scotland*, 105 U. S. 24. Years later the Court held that the Act could be invoked by a British shipowner in respect of a disaster suffered by a British ship on the high seas where no American vessel was involved, although the Court had many times said in earlier years that the principal purpose of the Act was to put American shipowners on a parity with foreign shipowners. *The Titanic*, 233 U. S. 718. Indeed, this Court has long since construed the Act so broadly as to hold that it is not limited to maritime torts, *Richardson* v. *Harmon*, 222 U. S. 96, and that it may be availed of by one who is only a stockholder of a corporate shipowner, *Flink* v. *Paladini*, 279 U. S. 59.

B. The Prosecution of Respondent's State Court Action Would Violate the Admiralty Court's Exclusive Jurisdiction of All Questions Affecting Limitation of Liability.

The Admiralty Court has exclusive jurisdiction of all questions affecting limitation of liability. *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *In re Morrison*, 147 U. S. 14; *The San Pedro*, 223 U. S. 365; *Hartford Accident and Indemnity Company* v. *Southern Pacific Co.*, *supra*, 273 U. S. 207. And this is true although, in single claim cases, or cases where the fund will exceed the claims, questions of liability and amount of damages may be determined in other Courts. *Langnes* v. *Green*, 282 U. S. 531; *Ex Parte Green*, 286 U. S. 437; *Petition of Red Star Barge Line*, 160 F. 2d 436 (C. C. A. 2); *Petition of Texas Company*, 213 F. 2d 479 (C. A. 2); *Petition of Trinidad Corporation*, *supra*, 229 F. 2d 423 (2 Cir.); *George J. Waldie Towing Co.* v. *Ricca*, *supra*, 227 F. 2d 900, 901 (2 Cir.).

The amount of the limitation fund obviously is at the very heart of limitation and is a matter exclusively for the Admiralty Court. In *Petition of Red Star Barge Line*, *supra*, 160 F. 2d 436 (2 Cir.), the sole claimant in the limi-

tation proceeding was permitted to proceed with her action at law only after she had conceded, among other things, the correctness of the amount of the limitation fund as claimed by petitioner, *i.e.*, she was not allowed to litigate the amount of the fund outside the limitation proceeding.

To the same effect are *W. E. Hedger Transp. Corp.* v. *Gallotta*, 145 F. 2d 870, 872 (2 Cir.); *The Norco*, 66 F. 2d 651, 652 (9 Cir.); *Petition of McAllister Bros.*, 96 F. Supp. 575, 576 (E. D. N. Y.); *The Kearney*, 3 F. Supp. 718, 720-1 (E. D. N. Y.).

Here the District Court thought that the Ulster County jury could "spell out the precise liability that may be imposed with respect to each vessel" (137 F. Supp. 311 at 313). But this would be to allow the jury to determine whether the statutory "vessel" was the tug alone, or the barge alone, or both, and so to fix the value of petitioner's interest in the "vessel". As the cases just cited show, this is so much a part of the shipowner's statutory right as to fall within the exclusive province of the Admiralty Court.

Frank and Clark, C. JJ., say (R. 61-2) that the State Court suit will not interfere with the exclusive admiralty jurisdiction because there can be no "effective determination by the state court of the value of either vessel." But this observation wholly misses the point. It is not a matter of fixing the dollar value of tug and barge but a matter of determining their liabilities. On the District Court's hypothesis the State Court will determine whether petitioner's liability arises from the fault of the tug, or the barge, or both. If such determination is binding it will fix, as between petitioner and respondent, the amount of petitioner's limitation fund because that fund is measured by the yardstick of liability of tug or barge or both. But the cases cited last above demonstrate, and the majority do not deny, that only the Admiralty Court has jurisdiction to fix the amount of the fund. Since the State Court cannot bind the Admiralty Court because the latter has exclusive

jurisdiction to determine the amount of the fund it necessarily follows that the whole State Court action must be nugatory.

Respondent has, as required, stipulated that she "waives any claim of *res judicata* relevant to the issue of limited liability" (R. 54). Therefore, any verdict in the Ulster County action purporting to determine the liability of either tug or barge, or fix its value, is not binding and those questions will have to be litigated again in the Admiralty Court.

Furthermore, so much of the verdict as fixes the amount of appellee's damages will be void as to the other claimants to the fund because they are not parties to the Ulster County action, yet they have a right to contest with appellee, and with each other, all questions of *quantum* of damage. *Petition of Trinidad Corporation, supra*, 229 F. 2d 423, 428 (2 Cir.). The other claimants in this proceeding have not signed stipulations as were required of other claimants in *Petition of Trinidad Corporation, supra* (R. 47-50).

The procedure of special verdict visualized by the District Judge would create such inscrutable problems as to be avoided at almost any cost. Suppose the jury were to hold both tug and barge, fix their aggregate value at $283,000, and fix appellee's damages at $250,000. But suppose also that in the limitation proceeding the Admiralty Court, finding only the tug at fault, enters a decree allowing petitioner to limit its liability to the tug's value, $118,000. Which result prevails; what then is the limit of petitioner's liability? The Admiralty Court will then fix the tug's value as the limitation fund and perpetually enjoin all persons, including respondent, from proceeding against petitioner otherwise than against that fund. The State Court's decision that liability flows from some fault in respect of the barge as well, and its judgment for more than the amount the Admiralty Court fixes as the limit of petitioner's liability

cannot possibly stand. The statute expressly provides that, where lack of privity or knowledge is established, the liability of the owner "shall not * * * exceed the amount or value of the interest of such owner in such vessel". Title 46 U. S. Code § 183(a). But if the jury finds liability on the part of both tug and barge and awards the $250,000 claimed, respondent will seek to issue execution on the judgment against petitioner's bank accounts. Unless enjoined this will certainly result in petitioner's paying more than the value of its interest in the tug held at fault by the Admiralty Court, thus nullifying the statute.

Suppose the Ulster jury holds only the tug and values her at $118,000, but in the limitation proceeding the Federal Court holds both tug and barge. Petitioner has not waived any right to claim *res judicata* as to the decisions of the State Court—and it does not. In this situation the Federal Court fund would be $283,000. The other claimants would collect a maximum of $9,525 and petitioner would have to pay respondent only $118,000 although her damages are $250,000 and there remained $155,475 in the Admiralty Court fund.

For a third possibility, suppose the Admiralty Court holds petitioner not liable but the State Court finds liability. Upon a finding of no liability the Admiralty Court will enter the usual decree of exoneration which incorporates a perpetual restraining order forbidding the prosecution of any and all claims against petitioner arising out of this incident. Either this would prevent respondent from collecting any judgment entered on the State Court's finding of liability, rendering the whole State Court proceedings fruitless, or, if the State Court judgment were collected it would be in contempt of the Admiralty Court's decree and in violation of the mandate of the limitation statute.

The majority of the panel say that this possibility "will present no difficulty" (R. 62). To petitioner the difficulty seems insuperable.

The dissenting judge (Hincks, C. J.) recognized the fruitless result of allowing respondent's State Court action to proceed. After examining the possible results in the State Court he said:

> "Thus considered the disposition of the court, in my view, subjects the parties to the labor and expense of litigation which may prove to be wholly fruitless and nugatory.
>
> That such may prove to be the result, I think, is more than a remote possibility. For that result will follow unless in the state court trial the judge shall require the jury find specially whether the plaintiff's injury (if caused by the owner's negligence) was caused by negligence in its conduct of the tug or by negligence in the barge. * * *. In my opinion, it is by no means unlikely that the judge would refuse a request to require special findings on the grounds that the request if granted would inject into the case an additional issue the solution of which is not essential to the decision of the case under the law of the state. * * *
>
> I deprecate sanction for a procedure whereby indivisible causes of actions and indivisible liabilities may be split and their respective fragments may be litigated in separate proceedings" (R. 67).

Even in the single claim cases, where no concourse is needed because there is only one claim, the claimant is not entitled, as of right, to try the issue of liability in the State Court. Even there it is discretionary with the Admiralty Court whether or not to modify the restraining order. *Langnes* v. *Green, supra,* 283 U. S. 531, and *Ex parte Green, supra,* 286 U. S. 437. Even if, in the case at bar, petitioner were not entitled to a concourse as of right, the court should have exercised its sound judicial discretion and refused to modify the restraining order because there are eleven claimants against a fund that will be large enough to pay all in full only if the barge, which was wholly under the control of the tug, should somehow be held at fault jointly with the tug.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed and the restraining order reinstated.

Dated: New York, N. Y., March 29, 1957.

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H. BARTON WILLIAMS,
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Appendix

The Limitation Statute as printed in Title 46 U. S. C. A. provides:

§ 183. **Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel".**

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: Provided, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the Owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d) and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such terms as used in section 188 of this title. (As amended Aug. 29, 1935, c. 804, § 1, 49 Stat. 960; June 5, 1936, c. 521, § 1, 49 Stat. 1479.)

§ 183b. **Stipulations limiting time for filing claims and commencing suit.**

"(a) It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the day when the death or injury occurred.

(b) Failure to give such notice, where lawfully prescribed in such contract, shall not bar any such claim—

(1) If the owner or master of the vessel or his agent had knowledge of the injury, damage, or loss and the court determines that the owner has not been prejudiced by the failure to give such notice; nor

(2) If the court excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor

(3) Unless objection to such failure is raised by the owner.

(c) If a person who is entitled to recover on any such claim is mentally incompetent or a minor, or if the action is one for wrongful death, any lawful limitation of time prescribed in such contract shall not be applicable so long as no legal representative has been appointed for such incompetent, minor, or decedent's estate, but shall be applicable from the date of the appointment of such legal representative: *Provided, however*, That such appointment be made within three years after the date of such death or injury. (R. S. § 4283A, as added Aug. 29, 1935, c. 804, § 3, 49 Stat. 960.)"

§ 183c. **Stipulations limiting liability for negligence invalid.**

It shall be unlawful for the manager, agent, master or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or

(2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are hereby declared to be against public policy and shall be null and void and of no effect. (R. S. 4283B, as added June 5, 1936, c. 521, § 2, 49 Stat. 1480.)

§ 184. **Apportionment of compensation.** Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto. (R. S. § 4284; Feb. 27, 1877, c. 69, § 1, 19 Stat. 251.)

§ 185. **Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee.**

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to

carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. (As amended June 5, 1936, c. 521, § 3, 49 Stat. 1480.)

§ 186. **Charterer may be deemed owner.** The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof. (R. S. § 4286.)

§ 187. **Remedies reserved.** Nothing in sections 182-185, or 186 of this chapter shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seamen of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel. (R. S. § 4287.)

§ 188. **Limitation of liability of owners applied to all vessels.**

Except as otherwise specifically provided therein, the provisions of sections 182, 183, 183b-187, and 189 of this

title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters. As amended June 5, 1936, c. 521, § 4, 49 Stat. 1481.

§ 189. **Limitation of liability of owners of vessels for debts.**

The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: *Provided,* That this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners. (June 26, 1884, c. 121, § 18, 23 Stat. 57.)

The Admiralty rules provide:

Rule 51. Limitation of liability—how claimed

The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851, entitled "An Act to limit the liability of shipowners and for other purposes" (Sections 183 to 189 of Title 46 of the U. S. Code, 46 U. S. C. A. §§ 183-189) as now or hereafter amended or supplemented, may file a petition in the proper District Court of the United States, as hereinafter specified. Such petition shall set forth the facts and circumstances on which limitation of liability is claimed, and pray proper relief in that behalf. It shall also state facts showing that the petition is filed in the proper district; the voyage on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort, arising on that voyage,

so far as known to the petitioner, and what suits, if any, are pending thereon; whether the vessel was damaged, lost or abandoned, and, if so, when and where: the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If any of the above particulars are not fully known to the petitioner, a statement of such particulars according to the best knowledge, information, and belief of the petitioner shall be sufficient. With his petition the petitioner may, if he so elects, file an interim stipulation, with sufficient sureties or an approved corporate surety, for the payment into court whenever the court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel at the close of the voyage or, in case of wreck, the value of the wreckage, strippings or proceeds, and of any pending freight recovered or recoverable, with interest at six percent per annum from the date of the stipulation, and costs. If such interim stipulation is filed, it shall be accompanied by an affidavit or affidavits of a competent person or persons corroborating the statement in the petition as to value of the vessel, or her wreckage, etc., and her freight. Said court, having caused due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight shall make an order for the payment of the same into court, or for the giving of a stipulation, with sufficient sureties or an approved corporate surety, for the payment thereof into court with interest at six percent per annum from the date of the stipulation, whether interim or final, and costs, whenever the same shall be ordered; or, if the petitioner shall so elect, the court without such appraisement shall make an order for the transfer by the petitioner of his interest in such vessel, or her wreckage, etc., and freight to a trustee to be appointed by the court under the fourth section of said Act.

If a surrender of petitioner's interest in the vessel or her wreckage, etc., is offered to be made to a trustee, the petition must further show any prior, paramount liens thereon, and what voyage or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

Upon the filing of such interim stipulation, or upon determination of value by appraisal and compliance with the court's order with respect thereto, or upon compliance with a surrender order, as the case may be, the court shall issue a monition against all persons asserting claims in respect to which the petition seeks limitation, citing them to file their respective claims with the Clerk of said court and to serve on or mail to the proctors for the petitioner a copy thereof on or before a date to be named in said writ which shall be not less than 30 days after issuance of the same, which time the court, for cause shown, may enlarge.

Notice of the monition shall be published in such newspaper or newspapers as the court by rule or order may direct in substantially the following form, once in each week for four successive weeks before the return day of the monition:

United States District Court

District of .....

Notice of Petition for Exoneration from or Limitation of Liability

(Filed .....)

Notice is given that ..... has filed a petition pursuant to Title 46, U. S. Code, §§ 183-189, 46 U. S. C. A. §§ 183-189, claiming the right to exoneration from or limitation

of liability for all claims arising on the voyage of the vessel ..... from ..... to ..... terminating on .....

All persons having such claims must file them, under oath, as provided in United States Supreme Court Admiralty Rule 52, with the Clerk of this Court, at the U. S. Court House at ..... and serve on or mail to the petitioner's proctors ..... at ..... a copy on or before ..... or be defaulted. Personal attendance is not required.

Any claimant desiring to contest the claims of petitioner must file an answer to said petition, as required by Supreme Court Admiralty Rule 53, and serve on or mail to petitioner's proctors a copy.

.....

U. S. Marshal.

The petitioner not later than the day of second publication shall also mail a copy of the above notice (copy of the monition need not be mailed) to every person known to have made any claim against the vessel or the petitioner arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice, together with a copy of Rule 52, shall be mailed to the decedent at his last-known address, and also to any person who shall be known to have made any claim on account of such death.

The said court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect to any claim or claims subject to limitation in the proceeding. Amended June 21, 1948.

Rule 52. Filing and proof of claim in limited liability proceedings

Claims shall be filed with the Clerk of the Court in writing under oath and a copy shall be served upon the proctor for the petitioner on or before the return day of the monition. Each claim shall specify the various allegations of fact upon which the claimant relies in support of his claim, the items thereof, and the dates on which the same accrued. Within thirty days after the return day of the monition or within such time as the Court thereafter may allow, the petitioner shall mail to the proctor for each claimant (or if the claimant have no proctor to the claimant himself) a list setting forth (a) the name of each claimant, (b) the name and address of his proctor or attorney (if he is known to have one), (c) the nature of his claim, i. e., whether property loss, property damage, death, personal injury, etc., and (d) the amount thereof.

Whenever an interim stipulation has been filed as provided in Rule 51, any person claiming damages as aforesaid, who shall have filed his claim under oath, may file an exception controverting the value of the vessel at the close of the voyage, or, in case of wreck, the value of her wreckage, strippings or proceeds, and the amount of her pending freight, and the amount of the interim stipulation based thereon, and thereupon the court shall cause due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight; and if the court finds that the amount of the interim stipulation is either insufficient or excessive, the court shall make an order for the payment of the proper amount into court or, as the case may be, for a reduction in the amount of the stipulation or for the giving of an additional stipulation.

Proof of all claims which shall be filed in pursuance of said monition shall thereafter be made before a commissioner to be designated by the court, or before the court as the court may determine, subject to the right of any

person interested to question or controvert the same; but no objection to any claim need be filed by any party to the proceedings; and on the completion of said proofs, the commissioner shall make report, or the court its findings on the claims so proven, and no confirmation of said commissioner's report, after hearing any exceptions thereto, or on such finding by the court, the moneys paid or secured to be paid into court as aforesaid or the proceeds of said vessel, or her wreckage, etc., and freight (after payment of costs and expenses) shall upon determination of liability be divided pro rata, subject to all provisions of law thereto, appertaining, amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled. Amended June 21, 1948.

Rule 53. Rights of owner to contest liability and of claimants to contest exoneration from liability or limitation of liability of owner

In the proceedings aforesaid, the petitioner shall be at liberty to contest his liability, or the liability of said vessel, provided he shall have complied with the requirements of Rule 51 and shall also have given a bond for costs and provided that in his petition he shall state the facts and circumstances by reason of which exoneration from liability is claimed; and any person claiming damages as aforesaid who shall have filed his claim under oath and intends to contest the right to exoneration or limitation, shall file an answer to such petition, and serve a copy on proctor for petitioner, and may contest the right of the owner or owners of said vessel, either to an exoneration from liability or to a limitation of liability under the said Act of Congress, or both, provided such answer shall in suitable allegations state the facts and circumstances by reason of which liability is claimed or right to limitation should be denied. Amended June 21, 1948.

Rule 54. Courts having cognizance of limited liability procedure

The said petition shall be filed and the said proceedings had in any District Court of the United States in which said vessel has been libeled to answer for any claim in respect to which the petitioner seeks to limit liability; or, if the said vessel has not been libeled, then in the District Court for any district in which the owner has been sued in respect to any such claim. When the said vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner, the said proceedings may be had in the District Court of the district in which the said vessel may be, but if said vessel is not within any district and no suit has been commenced in any district, then the petition may be filed in any District Court. The District Court may, in its discretion, transfer the proceedings to any district for the convenience of the parties. If the vessel shall have already been sold, the proceeds shall represent the same for the purposes of these rules. Amended June 21, 1948.

Rule 55. Appeals in limited liability cases

All the preceding rules and regulations for proceeding in causes where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf, shall apply to the Circuit Courts of Appeals of the United States where such cases are or shall be pending in said courts on appeal from the District Courts.

Supreme Court of the United States

October Term, 1956

No. 445

LAKE TANKERS CORPORATION,
Petitioner,

against

LILLIAN M. HENN, Admx.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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I. The amount of the first interim stipulation was proper.

Respondent claims that petitioner "wrongly shaped the proceedings from the beginning by filing a bond only for the tug" (p. 28) "because it knew that it was charged with negligence in the operation of the barge as well as of the tug" (p. 16). There is no proper basis for these assertions. When the petition was filed respondent had made no separate charge of negligence in the operation of the barge. Respondent's complaint, which was petitioner's only source of knowledge as to the basis of her claim when the petition was filed, makes no separate claim against the barge. The allegation was that the collision occurred

> "* * * solely through the negligence of Lake Tankers Corporation, by its agents, servants, employees, officers and crew in charge of the operation, management and control of said tug and barge, and of the defendant Clyde Roan, said vessel BLACKSTONE and the said barge as pushed by the said diesel tug were caused to collide and come together" (R. 20).

The only separate mention of the barge was "as pushed by the said diesel tug". Petitioner knew, as the petition later alleged, that the barge was without motive power of her own and was under the control of the tug, and that petitioner's "officers and crew in charge of the operation, management and control of said tug and barge" were the officers and crew of the tug. Since respondent's complaint made no separate allegation of negligence against the barge, or against any one claimed to have been in charge of her other than the tug's crew, respondent is quite wrong in contending that petitioner knew it was charged with negligence in the operation of the barge separately from the tug. Respondent first advanced this claim in the affidavit filed in support of her exceptions on the ground that the first stipulation was inadequate (R. 17).

The law is well settled that there is no liability on the part of a barge wholly under the control of the tug, unless she commits some personal fault of her own, separate and apart from that of the tug. *Sturgis* v. *Boyer*, 24 How. (65 U. S.) 110, 122; *Liverpool etc. Nav. Co.* v. *Brooklyn Eastern District Terminal*, 251 U. S. 48 (and other cases cited on page 7 of petitioner's main brief). Therefore, there was then no need to give bond for the barge. However, petitioner did anticipate the possibility of a claim against the barge and, in its petition, not only alleged its readiness to give bond for the value of its interest in the tug, but, also, for "such additional interest as may be appropriate,

whenever the same shall be ordered by the Court" (R. 4). Thus respondent fails in the argument that this proceeding was "wrongly shaped."

II. Petitioner does not admit liability by claiming limitation.

Respondent argues that the claim of limitation of liability is one of confession and avoidance and that the fault of each of the vessels is to be taken for granted, citing *Southern Pacific Co. v. United States*, 72 F. 2d 212 (2 Cir.) and *Petition of United States*, 178 F. 2d 243 (2 Cir.) (pp. 9-10, 30). But this is true only where liability is admitted or after liability has been established at trial. In both cases cited by respondent liability had been determined before the point now referred to was discussed. Nevertheless, respondent's whole argument seems based upon the misconception that, even at this preliminary stage in the proceeding, fault on the part of both tug and barge must be presumed. This is the basis of her argument that there already are two funds. Plainly this is not so. Admiralty Rule 53 expressly provides that "the petitioner shall be at liberty to contest his liability, or the liability of said vessel". Petitioner has done so in this case. See Articles Fourth and Tenth of the petition (R. 2-4). The District Court recognized this from the beginning. See opinion of Ryan, J. (R. 21-22).

III. The adequacy of the limitation fund is not established.

Respondent makes no attempt to meet petitioner's argument that a limitation proceeding may properly be begun, and other suits restrained, if, when it is begun, the claims exceed the possible fund.

Nor does respondent deny that, when this petition was filed, the claims against petitioner amounted to more than double the value of tug and barge put together.

Nor does respondent attempt to dispute petitioner's point that, once jurisdiction has attached, it is not subject to defeasance by claimants' reducing their claims.

Respondent's argument is based on the premise that the fund will be adequate and begs the question. There is not yet any fund. The claims aggregate $259,525, more than either the tug or the barge is worth. It can not now be said that the fund will surely exceed the claims unless this single proceeding must be considered as if it were two, with separate funds for tug and barge, and unless respondent's cause of the action is split and allocated part to each—and that is the question presented here. Respondent's position on this question is wholly theoretical. It exalts the concept of the juristic entity of tug and barge, and ignores the fact that petitioner is the only juristic person in court, and that the claims, said to be asserted against tug and barge, are in fact directed against petitioner *in personam* and its general funds.

IV. Concursus.

Although arguing that concursus is generally abhorrent, respondent makes no attempt to meet the argument, at pages 17-20 of petitioner's brief, that in four out of the five possible situations in which the shipowner may invoke the Act without there being an inadequate fund, the Court will take and keep jurisdiction. Indeed, The Court of Appeals for the Second Circuit is apparently willing, if asked, to look outside the Limitation Act for authority to require a concursus where the claims do not exceed the fund. In *Petition of Trinidad Corporation*, 229 F. 2d 423, the opinion concludes:

> "We conclude with this final caveat as to the scope of this opinion. In holding that the limitation statute

> confers no power on the district court to maintain a concourse once it has found that the fund is adequate, we do not hold that the court is without power derived from other sources in a proper case to enjoin a multiplicity of actions. For this appeal has been pitched solely on the effect of the limitation statute" (p. 431).

The Court may have had in mind a bill of peace, which still survives with notable vitality. See *Yuba Consolidated Gold Fields* v. *Kilkeary*, 206 F. 2d 884 (9 Cir.), and Pomeroy, Equity Jurisprudence, 5th Ed. 1941, Vol. 1, Sec. 269.

Respondent's argument that it is merely a matter of judicial discretion whether to vacate the injunction as to her also begs the question because it assumes that the fund must inevitably exceed the claims (p. 10). The only case in which this Court has held it to be a matter of discretion is *Langnes* v. *Green*, 282 U. S. 531, a single claim case discussed at pp. 25-28 of petitioner's main brief.

V. Prosecution of the State Court action would violate the Admiralty Court's exclusive jurisdiction of limitation questions.

Although arguing otherwise (pp. 28-33), respondent concedes the point that demonstrates that the prosecution of her State Court action must be nugatory. She agrees

> "* * * that the Admiralty Court has exclusive jurisdiction of all questions affecting limitation and that the amount of the fund is exclusively for the Admiralty Court to administer" (p. 30).

The yardstick for the amount of the fund is the individual liability of tug and/or barge (petitioner's main brief, p. 7). Respondent concedes, therefore, that the fixing of such liability "is exclusively for the Admiralty Court". But if she prosecutes her State Court action,

and if petitioner is held for negligence of both tug and barge, the fund must equal the value of both; but since, as respondent now concedes, the amount of the fund is exclusively for the Admiralty Court to determine, only the Admiralty Court can determine in any binding way whether the tug and/or the barge is guilty of separate fault. We have discussed this question at pages 33-37 of our main brief.

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed and the restraining order reinstated.

Dated: New York, N. Y., April 30, 1957.

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H. BARTON WILLIAMS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted] 445

In the Matter
of the
Petition of LAKE TANKERS CORPORATION,
Petitioner,
for exoneration from or limitation of liability.
LILLIAN M. HENN, Administratrix,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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CASES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 455

In the Matter
of the
Petition of LAKE TANKERS CORPORATION,
Petitioner,
for exoneration from or limitation of
liability.
LILLIAN M. HENN, Administratrix,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Opinions Below.

The opinion of the Court of Appeals is reported at 232 F. 2d 573 and is printed in the appendix to the petition at page 15, *et seq.* and at page 91a of the record. The Court's *per curiam* opinion granting the petition for rehearing *in banc* and adhering to its original decision, not yet reported, is printed in the appendix to the petition at page 30, and at page 173a of the record. The opinion of WEINFELD, J., in the District Court, from which the appeal was taken to the Court of Appeals, is reported at 137 F. Supp. 311, and it and the order entered thereupon are printed at pages 57a-63a of the record. His first opinion

is reported at 132 F. Supp. 504 and printed at page 35a of the record. The opinion of RYAN, J., is reported only at 1955 A. M. C. 55, but is printed at page 26a of the record.

Question Presented.

Respondent takes issue with the propriety and accuracy of the question presented by the petition. It will be shown hereinafter that the phrase "the aggregate of which is greater than the amount of its limitation fund" does not express the true circumstances of the case as required by Rule 23 (c) and is ground alone for denial of the petition, Rule 23, sub. 4. A review by this Court would necessarily turn upon an analysis of the facts, with petitioner's version at complete variance with the circumstances described in the Lower Courts' opinions.

Further, the writ is sought at an interlocutory rather than a final stage of the proceeding. The petition merely involves an order of the District Court modifying its own restraining order to permit the respondent, one of eleven claimants, to exercise her common law right to a jury trial subject to the preservation in the District Court of petitioner's right of limitation. No unusual factor is presented to justify a review by this Court.

Statement.

The inaccuracy in the question presented by the petition lies in the use of the word "aggregate" in reference to the claims and in relation to what petitioner calls "the amount of its limitation fund". The statement in the petition requires correction where it employs words indicating that the respondent "apportioned" or "allocated" her claim between the tug and barge for she did no such thing, either at the suggestion of the District Court, as stated at page 4 of the petition, or at her own instance, nor did the petitioner contend in the District Court that there was a single limitation fund. The statement of the holding of

WEINFELD, J., denying respondent's motion to vacate the restraining order upon the first hearing, is also erroneously summarized in the petition at page 4.

The Court at that time stated the petitioner's position (132 Fed. Supp. 504, 505):

> "The petitioner contends that Petition of Texas Co., supra, is inapplicable; that in fact the limitation funds do not exceed the aggregate of all claims filed against it. *It urges that in the instance proceeding there is not a single limitation fund of $283,542.21 but on the contrary two separate funds, one for the Eastern Cities in the sum of $118,542.21 and the other for the LTC No. 38 in the amount of $165,000, and that pending a final determination of liability on the part of each vessel, each fund must be treated separately* and so treated clearly the eleven claims exceed each fund and so must be brought into concourse." (Italics ours.)

Regarding each vessel as a separate entity, for which a separate stipulation had been required in substitution for the vessel, the Court then denied the motion to modify "but without prejudice to a further application by the claimant in the event appropriate stipulations are filed bringing the claims as against each vessel within the amount of its bond" (at p. 507).

Upon appeal from the order of modification, petitioner reversed its position and then contended that there was but one fund composed of two bonds and, accordingly, that Judge WEINFELD fell into error when he concluded that inasmuch as there were two vessels and two bonds there were two funds. The majority of the Court of Appeals rejected petitioner's disaffirmance of the position which it originally had taken, and which was the conclusion reached by Judge WEINFELD. It held that there are in truth two funds, separately established by petitioner as owner of each vessel, represented by two bonds, to which by their very terms, claimant is relegated for her recovery

against each, if liability is found against the petitioner as owner of either or both of the vessels. It should also be kept in mind that the problem which petitioner propounded in the District Court and the Court of Appeals arose from the fact that petitioner wrongfully filed a bond only on behalf of the tug, despite its knowledge that claimant, in her State Court suit, had charged negligence against the petitioner as owner of the barge as well as the tug. As Judge RYAN noted, upon the first hearing of the matter, a factual issue was presented for trial with respect to negligence of the barge personnel in the inadequacy of its lights, as well as to the tug's navigational errors (1955 A. M. C. 55, 56, not otherwise reported).

In support of respondent's assertion that there is inaccuracy in the use of the term "aggregate" in the question presented by the petition, as well as the use of similar expressions such as "apportion" and "allocated" in relation to the amount of the respondent's claim against petitioner as owner of each vessel, attention is respectfully directed to the opinion of WEINFELD, J., upon the second hearing when he modified the restraining order (137 Fed. Supp. 311, 312). The Court there pointed out that the bond on behalf of the tug was in the sum of $118,542.21 while the claims asserted against it, under the stipulations filed by the claimants, were limited to $109,525, that the bond filed on behalf of the barge was in the sum of $165,000, while the claims asserted against it under the stipulations filed by claimants were limited to $159,525, and further that claimants had stipulated that their claims would never be increased, that judgments in excess of the stipulated amounts would not be entered in any Court and that any claim of *res judicata* relative to the issue of limited liability, based upon a judgment in any other Court, was waived. The Court then said (at p. 312):

> "Nonetheless the petitioner contends that the motion to vacate the restraining order must again be denied

> because the amount of the administratrix' claim has not been reduced—'it has only been allocated as between tug and barge' and the aggregate of the claims remain as before. I cannot agree. The claimant has in fact reduced her claim as against each vessel. She will be entitled to the aggregate of her separate and reduced claims only if she succeeds in fastening liability by reason of the negligent operation of both the tug and the barge. As I stated in my earlier opinion: '* * * While it is true liability is charged against the barge * * * as well as the tug, it may eventuate that only the tug will be found liable, in which event the bond posted for the barge could not be availed of.' There are now two separate funds, one for the tug and one for the barge. Each limitation fund is clearly in excess of the total sum of the claims asserted as against each vessel."

The Court of Appeals adopted Judge WEINFELD's statement of the situation, including his conclusion that:

> "Since petitioner as ship owner is fully protected in the limitation of liability as to each vessel, there is no sound reason why claimant should not be permitted to proceed with her action in the State Court—the forum of her choice" (232 F. 2d 573, 576).

It affirmed on the basis that there were in effect two separate limitation proceedings, stating at page 577:

> "Accordingly, we must regard this case just as if it comprised two separate limitation proceedings. On that basis, we affirm. For, in respect of petitioner's liability as owner of each vessel, the order and appellee's stipulation (including her partial releases) comply with what we required in the *Trinidad* case. We interpret the order, the stipulation, and the partial releases, to relate to the liability of petitioner *in personam* as the owner of each vessel separately. All the claims against petitioner as the tug's owner come to $109,525, an amount less than the bond of $118,542.21 as to petitioner's liability as owner of that vessel; all the claims against peti-

> tioner as the barge's owner come to $159,525, an amount less than the bond of $165,000 as petitioner as owner of that vessel. Consequently, there was not an insufficient fund in respect of petitioner's liability either as owner of the tug or as owner of the barge."

Aside from the stipulations filed by other claimants as referred to above, this respondent carefully complied, by written stipulation, with express conditions and gave petitioner unconditional partial releases, duly verified before a notary public, all in accordance with a prior decision of the Court of Appeals for the Second Circuit in *Petition of Trinidad Corporation*, 229 F. 2d 423 and the order of Judge WEINFELD entered upon such stipulation. These are set forth in the opinion of the Court of Appeals at 232 F. 2d 577-579.

From the foregoing it will be preceived that there are glaring factual inaccuracies in the statement, as well as in the Question Presented in the petition. The respondent did not "apportion" or file a stipulation "purporting to allocate" her claim as between the tug and barge, either at the Court's suggestion or otherwise. As the Court of Appeals and District Court have pointed out she clearly *reduced* her claims against petitioner with respect to each of its vessels though it happens mathematically that they total $250,000. Of course, if she had reduced her claim against the barge to $120,000 and had given a partial release for the difference between that amount and her original claim, petitioner would not have had this weak mathematical reed to lean upon.

It is deemed important to make the reference, at this point in the brief, because it is not a question of law but a question of fact, which has been distorted both in petitioner's argument in the Lower Courts and in the petition before this Court. Petitioner seeks to have this busy Court analyze the circumstances again to reach a finding different

from that determined in the Courts below. It is therefore submitted that by reason of the inaccuracies and the burden which is sought to be imposed upon the Court the application is a frivolous one.

Argument.

I. The Court of Appeals did not construe the statute contrary to the rules established by this Court.

The gist of the petitioner's argument, based upon an erroneous statement of the circumstances of the case, is that the Court of Appeals did not construe the statute liberally for the benefit of the ship owner. However, there is the equally forceful principle that since the statute is in derogation of the common law and abridges the rights of claimant to a full recovery of her damages, it is not to be construed to interfere with her rights to a greater extent than is necessary to fully and adequately effectuate the purpose of the Act. *Petition of Southern Steamship Company,* 132 Fed. Supp. 316, 319 (D. E. Del.). This Court, in *Langes* v. *Green,* 282 U. S. 531, pointed out that it is within the discretion of the District Judge whether the restraint should be lifted and that such discretion should be exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result. The Court of Appeals for the Second Circuit, in *Petition of Trinidad* (*supra*), page 428, recognized that such discretion was with the District Judge, in his consideration of all of the circumstances. Having had the matter twice before him and with complete knowledge of all circumstances Judge WEINFELD, in a careful opinion, concluded: "Since petitioner as shipowner is fully protected in the limitation of liability as to each vessel, there is no sound reason why claimant should not be per-

mitted to proceed with her action in the State Court—the forum of her choice" (137 F. Supp. 313).

Of course, petitioner could have instituted one proceeding to limit its liability as owner of the tug and another to limit its liability to the value of the barge. It cannot enlarge its rights under the statute by the mere expedient of coupling the two proceedings (*In re: Petition of Lake Tankers Corporation, supra,* 576, 577). In fact, petitioner had urged in the District Court that it could have instituted separate proceedings and if, after Judge RYAN's decision requiring a posting of the bond for the barge, it had done so as barge owner, claimant would have filed a claim in each proceeding, the fund in each would have been adequate and she, long since, would have had her common law trial to recover, on behalf of herself and her three minor children, for the death of her husband. Apparently petitioner contends that it alone could determine whether she might have such trial in the law forum, that the choice depends upon petitioner's whim in the filing of a single or two proceedings. If such argument prevails it would follow that where a petition in limitation names two or more vessels, whose personnel are separately charged with fault, no relief whatever could be afforded by the Courts to save to claimant-suitors their common law remedy. The Courts would then be powerless to lift the restraint though claims are separately asserted against separate adequate funds. This course would be wholly opposed to this Court's holding in *Langes* v. *Green* (*supra*) where emphasis was laid upon the principles that the common law right to a jury trial must be preserved, just as the right of the shipowner to the benefits of the limitation statutes are to be preserved in the admiralty; that the act which gives the Court admiralty jurisdiction saves to suitors in all cases the right of the common law remedy where the common law is competent to give it, and good faith requires that this provision shall have its full force and effect. It was further

recognized that if there is an ulterior purpose, and petitioner's object in invoking the jurisdiction of the admiralty court is to escape a jury trial and take the case away from the common law jurisdiction that purpose should receive no countenance.

II. There is no case for a *concursus* here.

Under similar circumstances, where by stipulation, the claimants had reduced their claims, agreed never to increase them and waived any claim of *res judicata* relevant to the issue of limited liability, the Court of Appeals for the Second Circuit in *Petition of Texas Co.*, 213 F. 2d 479 modified the injunction in a limitation to permit claimants to proceed to trial in the forum of their choice. In that case, where the argument with respect to a *concursus* was thoroughly exhausted, and the matter brought to this Court upon a petition for a writ of certiorari, the petition was denied (348 U. S. 829, 99 L. Ed. 653).

At page 9 of the petition it is suggested that the other claimants will ask and obtain leave to proceed with their actions at law also. The Court of Appeals for the Second Circuit has already resolved that question (232 F. 2d subnote p. 577):

> "Petitioner suggests that perhaps the other claimants may seek to proceed elsewhere. The resultant problem cannot arise unless and until they file appropriate stipulations and partial releases. Moreover, an application to relax the restraining order as to them must be made seasonably as we said in *Trinidad;* and the limitation proceeding was instituted a year and four months ago."

At pages 9 and 10 petitioner erroneously urges again that the claims "aggregate" $259,000 and makes unnecessary refefence to the amounts of claims in pending State Court actions (since all claims have been fixed by stipula-

tion). It also states that its limitation fund would not exceed the value of the tug, $118,500 "unless somehow the barge, without motive power and wholly under the control of the tug, is also held at fault". It is not seen how petitioner may assume to judge the unliklihood of its being held for the negligence of those on its barge any more than for the negligence of those on its tug. It is settled law that the right to limit is in substance always a plea in confession and avoidance, either partial or total, according to the existence or absence of salvage and freight, that for this reason the owner may plead it as a defense to the claimant's action if he pleases and that when he proceeds by petition, he does not change his legal position on the main issues. Further, the fault of the vessel (in this case the barge as well as the tug) is to be taken for granted on the question of limitation.

Southern Pacific Co. v. *United States,* 72 F. 2d 212, 214 (C. A. 2);
Petition of United States, 178 F. 2d 243, 252 (C. A. 2).

The petitioner also urges that here there is a reasonable apprehension that the multiple claims will exceed its interest in each of the vessels, but this is premised upon the repeated misstatement of fact that there was an "allocation" of respondent's claim, which coupled with the reduction of all claims, petitioner says, would deprive the admiralty court of jurisdiction. That argument again is completely contradictory of the decisions of the two Lower Courts and the stipulation filed in support of the appealed order (232 F. 2d, pp. 573, 577, 137 F. Supp., p. 313; appendix to petition, pp. 20, 22, 25, record, pp. 61a, 63a).

III. There is no delegation to the State Court of the determination of a vessel's liability *in rem* as suggested by petitioner.

By general statements of law, the supporting authorities, and by suppositious problems which it poses, the petitioner seeks to convey the notion that by some quirk of procedure the State Court would invade the sole province of the Admiralty Court to determine the *in rem* liability of a vessel.

The Court of Appeals in this case (*supra*) wrote at page 577:

> "As Judge WEINFELD said, a special verdict in the state court suit will decide whether petitioner is liable for the conduct of either or neither vessel, or both vessels. That suit will not interfere with the exclusive admiralty jurisdiction of the court below affecting the limitation of liability: (a) No judgment of the state court can operate *in rem:* (b) Appellee's stipulation (which includes a waiver of any claim of *res judicata* relevant to the issue of limited liability of petitioner as owner of either the tug or the barge) and her partial releases, together with the reserved jurisdiction of the district court, prevent any effective determination by the state court of the value of either vessel."

Judge WEINFELD had pointed out that "a special verdict may be applied for which would spell out the precise liability that may be imposed with respect to each vessel. It is not to be presumed that the State Court will deny an appropriate application for a special verdict" (137 F. Supp., p. 313).

The New York Civil Practice Act, Sections 458 and 459 make clear provision for instructions to the jury on a special verdict by questions and findings in writing, and which must be filed with the Clerk and entered in the minutes, upon which a judgment is issued. The New York

State reporters are replete with cases where those sections have been employed successfully and the appellate courts have encouraged the practice for the very purpose of lightening their work. This case is a prime example of one where the special verdict would be of particular value. Further, why should there be confusion or difficulty in this respect, upon a trial before a jury, any more than before a District Judge who is charged under this Court's Admiralty Rule 46½ to make specific findings of fact? The determination by the jury of liability of petitioner for the negligence of the personnel of either or both vessels and the amount of respondent's damages are wholly apart from the sole and exclusive jurisdiction of the Admiralty Court over the limitation proceedings. Thus the rights of both parties will be amply protected and the rule of *Langes* v. *Green* (*supra*) will be complied with.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 22, 1956.

Supreme Court of the United States

OCTOBER TERM, 1956

No. 445

LAKE TANKERS CORPORATION,
Petitioner,

against

LILLIAN M. HENN, Administratrix,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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OCTOBER TERM, 1956

No. 445

LAKE TANKERS CORPORATION,
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against
LILLIAN M. HENN, Administratrix,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Question Presented

Respondent takes issue with the accuracy and propriety of the language of the question presented at page 2 of petitioner's brief. The District Court and the Circuit Court of Appeals found that the aggregate of the claims is *not* greater than the limitation funds, as petitioner states in the question.

The District Court said:

> "Each limitation fund is clearly in excess of the claims asserted against each vessel." Petition of Lake Tankers Corp., 137 Fed. Supp. 311, 313; R. 59.

The Court of Appeals also held:

> "Consequently there was not an insufficient fund in respect of petitioner's liability either as owner of the tug or as owner of the barge." Petition of Lake Tankers Corp., 232 F. 2d 573, 577; R. 61.

This important finding of both Lower Courts renders the question presented defective as without factual foundation.

Statement of Case

Respondent's claim arises from the death of her husband, Robert C. Henn, resulting from a collision of the petitioner's barge *LTC No. 38*, in tow of its tug *Eastern Cities*, on the early morning of July 10th, 1954 in the Hudson River, above Poughkeepsie, New York, with the pleasure yacht *Blackstone*, on which the deceased was a passenger. He was thirty-six years of age and left him surviving his wife, the claimant herein, of the age of thirty years and three daughters of ages 9, 5 and 3 years. His body was not recovered (R. 26, 28).

This sequence of legal proceedings followed the occurrence:

September 20th, 1954—Letters of Administration were issued to claimant by the Surrogate's Court, Dutchess County, N. Y. (R. 19-20).

September 22nd, 1954—She instituted suit, as such administratrix, against petitioner, as owner of tug *Eastern Cities* and barge *LTC No. 38* alleging negligence of the petitioner and its servants in charge of the operation of both the tug and barge. Clyde Roan, owner of the yacht *Blackstone*, was also named as a defendant, and damages were claimed against both defendants in the sum of $500,000 (R. 3).

October 6th, 1954—A limitation petition was filed in the Southern District by petitioner, alleging ownership of the tug *Eastern Cities* and the barge *LTC No. 38*, that it had used diligence to make both vessels seaworthy, that the loss of life and property damages resulting from the collision were not caused through any fault on its part, or the *Eastern Cities* or the *No. 38*. Its petition made no reference to the value of the barge *LTC No. 38*, but alleged

that the tug *Eastern Cities'* value did not exceed $110,000 and that the pending freight was $8,542.21, that petitioner believed that the entire aggregate value "of its interest in said *Eastern Cities*" did not exceed $118,542.21, for which it offered a stipulation for value in that amount, "said sum being not less than the aggregate value of petitioner's interest in said tug and her pending freight". It also alleged that there were no unsatisfied demands or liens "against the *Eastern Cities*, her engines, etc., or her pending freight". The petitioner prayed, among other things, for appraisement of its interest in the tug *Eastern Cities* and that its liability, if found, be limited to the value of its interest in said tug and her pending freight, that it be discharged from all liability upon the surrender of "such interest" and that the money surrendered be divided pro rata among such claimants as might duly prove their claims (R. 1-6).

October 8th, 1954—A restraining order, issued by Honorable ARCHIE O. DAWSON in the Southern District of New York, was based upon affidavits of appraisers "as to the value of the tug *Eastern Cities* and her pending freight" and a stipulation for value for the tug and freight, in the sum of $118,542.21 (R. 10). It enjoined the prosecution of all suits "against petitioner herein and/or against the tug *Eastern Cities*" (R. 11).

November 8th, 1954—This respondent appeared specially and filed exceptions to the petition on the ground that the petitioner sought limitation and exoneration with respect to the barge *LTC No. 38* but failed to surrender that vessel and, therefore, such exemption could not be claimed in this proceeding. The application was for an order sustaining the exceptions and for a final decree dismissing the petition and vacating the injunctive order of October 8th, 1954 (R. 12-21).

December 16th, 1954—Honorable SYLVESTER J. RYAN denied the motion but held that the petitioner's failure to

file an additional bond on behalf of the barge *LTC No. 38* would require modification of the restraining order so that it would have effect only with respect to the tug *Eastern Cities* (not officially reported, R. 21-23).

February 10th, 1955—Petitioner filed a bond on behalf of barge *LTC No. 38* in the amount of $165,000 reciting the value of the barge as in that sum and that "the petitioner herein, as owner of barge *LTC No. 38*, hereby consents and agrees that, if the claimants herein recover a decree may be entered against it in amount not exceeding the above stated amount" (i. e.) $165,000 (R. 24-26).

March 1st, 1955—Respondent filed her answer and her claim in the amount of $250,000. There were also filed ten other claims, accounting for all possible claimants in the proceeding, of a total of $9,525, so that the sum total of all original claims filed was $259,525 (R. 26, 27, 28, 33).

March 24th, 1955—Respondent moved before Honorable Edward Weinfeld for an order vacating the restraining order as to her state court action claiming that upon the filing of appropriate stipulations, in accordance with *Petition of Texas Co.*, 213 F. 2d 479 (C. A. 2), the restraining should be lifted since the claims of $259,525 were in amount less than the security posted on behalf of the tug and barge, $283,542.21 (R. 30-33).

July 14th, 1955—Judge Weinfeld adopted petitioner's argument that here there were two separate funds, one of $118,542.21 for the tug and another of $165,000 for the barge (R. 43) and accordingly he denied the motion; however, without prejudice to a further application by respondent in the event appropriate stipulations were filed bringing all claims against petitioner as to each vessel within the amount of the bond filed for each vessel. 132 F. Supp. 504 (R. 42-46).

August 10th, 1955—The order was entered upon the

September 23rd, 1955—The ten claimants, other than this respondent, filed stipulations agreeing not to increase the amounts of their claims as made in the total sum of $9,525, nor to enter judgments in excess of their amounts and waiving any claim of *res judicata* with respect to the question of limitation of either of the vessels (R. 47-50).

On the same day this respondent filed a stipulation reducing her claim against petitioner, as owner of the *Eastern Cities* to $100,000, and as owner of the *LTC No. 38* to $150,000. She also agreed not to increase the amount of either of said claims as to the petitioner or either of its vessels, or to enter judgment in excess of the stipulated amounts of her claims against petitioner as owner of either of them, and she waived any claim of *res judicata* with respect to the limitation issues involving either of the vessels (R. 36).

October 4th, 1955—Respondent again moved for a modification of the restraining order of October 8th, 1954 so that she could proceed with her state court suit, basing the motion upon Judge WEINFELD's prior decision and order and the stipulations filed in full compliance therewith (R. 37-41).

December 29th-30th, 1955—Judge WEINFELD rendered his decision, supplemented by a memorandum decision making reference to *Matter of Trinidad Corp.*, decided December 28th, 1955, 229 F. 2d 423 (C. A. 2), and which, he held, supported his disposition of this matter. He granted respondent's motion and, by the memorandum decision, directed that further stipulations and partial releases, suggested in the *Trinidad* case, be submitted by respondent with the proposed order. 137 Fed. Supp. 311 (memorandum decision, R. 51).

January 16th, 1956—Judge WEINFELD signed the order modifying the restraining order of October 8th, 1954 with respect to respondent's state court suit, the respondent having offered her sworn stipulation and partial releases

required by the Court's decision. The order granting the motion was made subject to the following conditions:

> 1. that claimant shall be permitted to prosecute her suit in Supreme Court, State of New York, Ulster County only to judgment;
>
> 2. that the injunction of October 8th, 1954, insofar as its enjoins collection of the judgment elsewhere that in this proceeding, shall be continued;
>
> 3. that the Court expressly reserves jurisdiction to reestablish a concourse and to adjudicate the petitioner's right to a limitation in the event that the funds should ultimately prove to be inadequate;
>
> 4. that in no event shall this claimant recover from the fund an amount in excess of her claim as reduced by the partial releases heretofore given until all other claims have been satisfied in full;
>
> 5. that the Court further retains jurisdiction of this proceeding against the event that petitioner's right to limit liability of either the tug EASTERN CITIES or barge L. T. C. No. 38 should be questioned in any other forum (R. 52, 53).

Respondent's stipulation and partial releases read as follows:

> "1. She reiterates and affirms the terms of the written stipulation, heretofore executed by her on September 6th, 1955, duly acknowledged before a Notary Public of the State of New York, Dutchess County, and filed herein on September 23rd 1955, providing:
>
> (a) that her claim as against the tug EASTERN CITIES, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is reduced to the sum of $100,000;
>
> (b) that her claim as against the barge L. T. C. No. 38, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is reduced to the sum of $150,000;

(c) that she will not increase the amount of either of said claims as against either of the said vessels, as above stated, or the petitioner and its stipulators for value at any future date beyond the amounts so stated;

(d) that she will not enter judgment in any Court in excess of the stipulated amounts of her claims against petitioner as owner of either of said vessels;

(e) that she hereby waives any claim of res judicata relevant to the issue of limited liability with respect to either of said vessels, based on a judgment in any other Court.

2. As her unconditional partial release she represents:

(a) that the total amount of all claims filed herein as against the tug Eastern Cities and the petitioner, as her owner, in $109,525; the total amount of all claims filed herein as against the barge L. T. C. No. 38 and the petitioner, as her owner, is $159,525;

(b) that in consideration of the entry of an order upon this stipulation, pursuant to the decisions of Honorable Edward Weinfeld, United States District Judge, dated December 29th and 30th, 1955, modifying the injunctive order entered herein October 8th, 1954, to permit the prosecution of her suit in Supreme Court, State of New York, Ulster County, she hereby releases and forever discharges the petitioner, its successors and assigns and the tug EASTERN CITIES and the barge L. T. C. No. 38 unconditionally but partially to the extent hereinafter described from all causes of action whatsoever, in law, in admiralty, or in equity which against them she ever had, now has or which her successors hereafter shall or may have by reason of the death of Robert C. Henn on July 10th, 1954, resulting from a collision between the motor yacht BLACKSTONE, on which he was a passenger, with the barge

L. T. C. No. 38 in tow of the tug EASTERN CITIES, in the Hudson River; it being the intent and purpose of this release that it be partial to the extent of the difference between the amount of her claim originally filed herein in the sum of $250,000 and the reduced amount of her claim heretofore stipulated as against the tug EASTERN CITIES of $100,000, so that the amount hereby released as to such tug and the petitioner is $150,000; and it being the further intent and purpose of this release that it be partial to the extent of the difference between the amount of her claim originally filed herein in the sum of $250,000 and the reduced amount of her claim heretofore stipulated as against the barge L. T. C. No. 38 of $150,000, so that the amount hereby released as to such barge and the petitioner is $100,000.

3. She consents to, and hereby authorizes her proctors Rosen & Rosen, to submit an order to the Court for entry and providing:

(a) that she shall be permitted to prosecute her suit in Supreme Court, State of New York, Ulster County only to judgment;

(b) that the injunction of October 8th, 1954, insofar as it enjoins collection of the judgment elsewhere than in this proceeding, shall be continued;

(c) that the Court expressly reserves jurisdiction to reestablish a concourse and to adjudicate the petitioner's right to a limitation in the event that the funds should ultimately prove to be inadequate;

(d) that in no event shall this claimant recover from the fund an amount in excess of her claim as reduced by the partial releases heretofore given until all other claims have been satisfied in full;

(e) that the Court further retains jurisdiction of this proceeding against the event that peti-

tioner's right to limit liability of either the tug Eastern Cities or barge L. T. C. No. 38 should be questioned in any other forum (R. 54).

April 13, 1956—The Court of Appeals for the Second Circuit affirmed the order of the District Court in an opinion written by Judge FRANK and in which Chief Judge CLARK concurred. Judge HINCKS dissented 232 F. 2d 573 (R. 57). The Court modified the order below by a further limitation upon respondent's measure of recovery (R. 62).

April 27, 1956—A petition for rehearing was filed by the petitioner.

June 7, 1956—Petitioner filed a petition for a hearing *en banc*.

August 21, 1956—The petition for rehearing *en banc* was granted and upon the rehearing the Court adhered to its original decision, without opinion, Chief Judge CLARK and Judges FRANK, LUMBARD and WATERMAN being the majority, and with Judges HINCKS and MEDINA dissenting, also without opinion 235 F. 2d 783 (R. 82).

September 24, 1956—Petitioner filed its petition for certiorari.

November 19, 1956—The petition for certiorari was granted (R. 84).

Summary of Argument

A. The admiralty jurisdiction of the District Court over the limitation proceedings is not challenged, but rather has been conceded by respondent in her answer and by her formal stipulations (R. 29, 54, 36). It has been preserved completely by the District Court's order which modified the restraining order permitting respondent to pursue her common law remedy *only to judgment* in the state court (R. 52, 53).

B. The right to limit is in substance always a plea in confession and avoidance, either partial or total, according to the existence or absence of salvage and freight. For this reason the owner may

plead it as a defense and when he proceeds by petition, he does not change his legal position on the main issues. *Southern Pacific* v. *U. S.*, 72 F. 2d 212, 214 (C. A. 2). The fault of each of the vessels is to be taken for granted on the question of limitation as that is really a defense of confession and avoidance. *Petition of U. S.*, 178 F. 2d 243, 252 (C. A. 2).

C. On a finding of an adequate fund and application having been seasonably made by a claimant to have the injunctive order modified, it is a proper exercise of discretion to grant leave to prosecute a claim outside the concourse. It would constitute an abuse of discretion to deny such an application and thus deprive the claimant of her choice of forum. *Petition of Trinidad Corp.*, 229 F. 2d 423, 428 (C. A. 2). To retain the cause in the District Court would be to preserve the right of the ship owner, but to destroy the right of the suitor in the state court to her common law remedy; to remit the cause to the state court for a limited purpose on the issues of negligence and damage would be to preserve the rights of both parties. In the exercise of a sound discretion, the District Court followed that course, granting respondent's motion to modify the restraining order so as to permit the cause to proceed in the state court, retaining, as a matter of precaution, the petition for limitation of liability to be dealt with in the possible but unlikely event that the right of petitioner to a limited liability might be brought into question in the state court, or the case otherwise assume such form in that court as to bring it within the exclusive power of a Court of Admiralty. The failure of the District Judge to do otherwise would have constituted an abuse of discretion subject to the correcting power of the appellate court below and of this Court. *Langnes* v. *Green*, 282 U. S. 531, 541. Because the statute is in derogation of the common law and abridges the rights of a claimant to a full recovery of her damages, it is not to be construed to interfere with the rights of claimant to a greater extent than is necessary to fully and adequately ef-

fectuate the purposes of the Act. *Petition of Southern Steamship Co.*, 132 F. Supp. 316, 319 (D. C. Del.).

D. The adequacy of the funds having been clearly found by the Lower Courts, (1) the statutory privilege of limiting liability is not in the nature of a *forum non conveniens* doctrine, and (2) the statute gives the shipowner sued in the state court no advantage over other kinds of defendants in the same position. Concourse is to be granted only when necessary in order to distribute an inadequate fund. The purpose of limitation proceedings is to provide a marshalling of assets—the distribution pro rata of an *inadequate* fund among claimants none of whom can be paid in full. *Petition of Texas Co.*, 213 F. 2d 479, 482 (C. A. 2) Cert. denied 348 U. S. 829; *Petition of Trinidad Corp.*, 229 F. 2d 423, 427, 428 (C. A. 2); *Curtis Bay Towing Co.* v. *Tug Kevin Moran Inc.*; 159 F. 2d 273, 276 (C. A. 2); *Petition of Moran Transportation Corp.*, 185 F. 2d 386, 388, 389 (C. A. 2); *Petition of Red Star Barge Line, Inc.*, 160 F. 2d 436 (C. A. 2); *The Aquitania*, 14 F. 2d 456, 458, affirmed 20 F. 2d 457 (C. A. 2).

E. Since the petitioner is fully protected in the limitation of liability as to each vessel, there is no sound reason why respondent should not be permitted to proceed with her action in the state court —the forum of her choice—the Court having retained jurisdiction of the limitation proceeding in the event the petitioner's right to limit liability of each vessel should be questioned. *Petition of Lake Tankers Corp.*, 137 F. Supp. 311, 313 (R. 60).

F. The petitioner's argument that it is entitled to a *concursus*, therefore, is specious, without foundation in fact and is plainly designed for the ulterior purpose of defeating respondent's common law remedy. It should receive no countenance in this Court. *Langnes* v. *Green*, 282 U. S. 531, 543.

G. The state court trial of the issues of negligence and damages will present no difficulty as the

do not touch the limitation rights of petitioner or of its interest value in its vessels. Petitioner endeavors by its arguments to "overinflate a relatively simple proposition with apparent, but unreal technical problems". *Maryland Cas. Co.* v. *Cushing*, 347 U. S. 409, 428.

ARGUMENT

I. The adequacy of the funds in the limitation proceeding is amply established.

The discussion of this factual issue is necessitated by the inconsistent contentions made by petitioner both in this Court and below. It has premised its case in the application for the writ of certiorari and again in the opening arguments of its appeal brief on the statement that "the aggregate of the several claims *exceeded* the value of petitioner's interest in its vessels" petitioner's brief, page 10.

Strangely enough it then argues that neither this Court's Admiralty Rules nor the Limitation Statutes require that the claims *exceed* the fund before the Court can take jurisdiction of the proceeding (pp. 10, 11, petitioner's brief). This unusual approach is finally explained by Point III at page 15, for there appears the real cause for the appeal—"*Concursus* is not contingent upon the existence of an inadequate fund". Then under Point IV, for safety's sake, it is stated that the claims *exceed* the fund and that petitioner is entitled to a *concursus* (p. 27). As all this leads to confusion it is deemed necessary to "lay the ghost" as to the adequacy or inadequacy of the fund once and for all.

The District Court found:

> "There are now two separate funds, one for the tug and one for the barge. *Each limitation fund is clearly in excess of the claims asserted as against each vessel.*" Petition of Lake Tankers Corp., 137 F. Supp. 311, 313 (italics ours).

The Court of Appeals found:

> "All of the claims against petitioner as the tug's owner come to $109,525, an amount *less* than the bond of $118,542.21 as to petitioner's liability as owner of that vessel; all of the claims against petitioner as the barge's owner come to $159,525, an amount *less* than the bond of $165,000 as to petitioner's liability as owner of that vessel. *Consequently there was not an insufficient fund in respect of petitioner's liability either as owner of the tug or as owner of the barge.*" Petition of Lake Tankers Corp., 232 F. 2d 573, 577 (italics ours).

The petitioner cannot complain of the treatment of the case by both Lower Courts on a separate fund per vessel basis because the Courts have simply adopted petitioner's own earlier view of the matter. When respondent first moved for a modification of the order restraining her pending State Court action on the ground that the additional bond belatedly posted for the barge in the sum of $165,000 then made a total fund of $283,542.21 against claims of only $259,525, the petitioner strongly opposed that view and argued that there were in fact two separate funds for the two vessels and, therefore, the claims exceeded each fund of $118,542.21 and $165,000 respectively. Nowhere in its brief does petitioner mention this circumstance of argument below. Instead it makes scant reference to the holding of WEINFELD, J. "that there are two funds, each more than the claims against it" (p. 9, petitioner's brief) and complains that the Court of Appeals' finding is "unprecedented" (p. 30).

This was not petitioner's contention on another day when it suited its purpose of defeating the respondent-widow's right to a jury trial in the state forum of her choice, by claiming that there were two funds:

> "The petitioner contends that Petition of Texas Co., *supra*, is inapplicable; that in fact the limitation

> funds do not exceed the aggregate of all claims filed against it. *It urges that in the instant proceeding there is not a single limitation fund of $283,542.21 but on the contrary two separate funds, one for the Eastern Cities in the sum of $118,542.21 and the other for the LTC No. 38 in the amount of $165,000 and that pending a final determination of liability on the part of each vessel, each fund must be treated separately and so treated clearly the eleven claims exceed each fund and so must be brought into concourse.*" Petition of Lake Tankers Corp., 132 F. Supp. 504, 505 (italics ours).

Another misstatement under this subject in petitioner's brief requires examination:

In compliance with the condition of WEINFELD, J.'s order denying the first motion for modification, namely that she could renew her application "in the event appropriate stipulations are filed bringing the total claims * * * within the amounts of the respective interim stipulations * * * on behalf of the tug *Eastern Cities* and the barge *LTC No. 38*", respondent reduced her claims against petitioner as tug owner to $100,000 and as barge owner to $150,000 (R. 35, 36).

Though it happened that the sum total of her reduced claims was $250,000, she nevertheless "reduced" them by the clear language of the stipulation. If she had reduced either claim by $5,000 or $10,000 more petitioner would not have the mathematical weak reed to work with in asserting throughout the litigation that respondent merely "allocated" or "apportioned" her claim and, therefore, the picture had not changed. Neither lower court was swayed by that argument. The District Court wrote:

> "Nonetheless the petitioner contends that the motion to vacate the restraining must again be denied because the amount of the administratrix's claim had not been reduced—'it has only been allocated as between the tug and barge' and the aggregate of the

claims remain as before. I cannot agree. The claimant has in fact reduced her claim as against each vessel." Lake Tankers Corp., 137 F. Supp. 311, 313.

In its statement of the case the Court of Appeals disregarded the tenuous assertion of "allocating" and stated that "appellee filed a stipulation reducing her claim". *Petition of Lake Tankers Corp.*, 232 F. 2d 573, 575 (R. 58).

In its brief in this Court, petitioner still clings to the same erroneous view and repeatedly speaks of the respondent's having "allocated" or "apportioned" her claim. At page 7 it goes so far as to say of WEINFELD, J.: "However, in his opinion the Judge *suggested* that respondent could *escape* the restraining order and the *concursus* of the limitation proceeding if she would *apportion* her claim against the tug and barge and bring the amounts of the claims against each vessel to a sum less than its value" (italics ours). This unfortunate language requires correction in at least two places.

Likewise the elaborate table of claims at page 8 of petitioner's brief is completely contrary to the findings of the Lower Courts and to the truth of the matter. It was used in the briefs below and disregarded and, we submit, it has no place in this argument.*

Drawing support from any direction, the petitioner also stresses the amounts of damages claimed originally in the State Court suits brought by this respondent and four other claimants. The stipulations in the limitation proceedings unequivocally fix the amounts of all claims without regard to the original State Court claims. Each claimant has agreed not to increase the amount of his or her claim as fixed by the stipulations in the limitation proceeding (R. 36, 47-50, 54-56). Therefore, this "straw man" is like the others.

It will be seen that though petitioner in its Summary

* The index of the record is also incorrect in labelling respondent's stipulation as one "allocating" her claim.

of Argument (p. 10) and elsewhere complains of the "maneuverings" of the widow respondent to preserve her common law right to a jury trial in the court where her suit is pending, the petitioner itself has used every possible artifice and argument to defeat her. It was wrong at the outset in failing to file proper security for the barge, as Judge RYAN early held (not officially reported, R. 21), because it knew that it was charged with negligence in the operation of the barge as well as of the tug (R. 19). The restraining order was granted erroneously for that reason (R: 10). It was willing to contend that there was a separate fund thereafter for each vessel—only for the purpose of restraining the State Court proceeding. Having taken that position it about faced in the Court of Appeals and complained of WEINFELD, J.'s holding of two funds as if it had nothing to do with it. It still urges against its original contention and the finding of both Lower Courts. It is still willing to advance the specious argument of "allocation" in spite of the findings below.

It is made perfectly plain that petitioner seeks only to destroy a right to which respondent is clearly entitled,—to try in the forum of her choice the cause for the negligent death of her husband and the father of her three small daughters. The foregoing review proves conclusively that the "maneuverings" have all been on the petitioner's part, and for an ulterior purpose. They should receive no countenance by this Court. *Langnes* v. *Green*, 282 U. S. 531.

II. On a finding of an adequate fund it is a proper exercise of discretion to grant leave to prosecute a claim outside the concourse.

As this Court has recognized, the Southern District of New York and the Court of Appeals for the Second Circuit have been the fountainheads of sound admiralty law principles developing from the great volume of business of

this nature in those Courts. *Bisso, Jr.* v. *Inland Waterways Corp.*, 349 U. S. 85, 99, 100.

Petitioner sharply complains of what it calls a "rule" in this Circuit and which, it says, is opposed to a result which it urges under Point III, namely, that *concursus* is not contingent upon the existence of an inadequate fund. No decision of this or any other Court directly in point is cited but rather bits of dictum are supplied to support a contention which is wholly out of step with conditions in the shipping and insurance industries in the year 1957. Relying on the privilege, accorded by a Statute more than one hundred years old, to *limit* its liability, it asks this Court to disregard the principal object of the Statute and to hold that its primary purpose was to bring all claims into concourse without regard to the limited liability feature. It contends that in *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 490, 417 this determination was made and it also cites *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 357, 359 as supporting its position. These authorities and other cases were urged before the Court of Appeals for the Second Circuit in *Petition of Texas Co.*, 213 F. 2d 478 (C. A. 2) Cert. denied 348 U. S. 829 and in *Petition of Trinidad Corp.*, 229 F. 2d 423 (C. A. 2).

The Court of Appeals, in both of those cases rejected the argument.

In *Petition of Texas Co.* (*supra* 481), the Court wrote:

> "Although the claims as originally filed exceeded the fund (or stipulated value) of $2,109,957.58, they have now been reduced by stipulation so that the fund is about $350,000 in excess of all filed claims. As a consequence, we do not have the problem of a distribution of an insufficient fund contemplated by the staute. For 46 U. S. C. A. § 184 provides that, when loss is suffered by several persons, 'and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation . . .

in proportion to their respective losses', and that the limitation proceedings are 'for the purpose of apportioning the sum * * * among the parties entitled thereto (citing authorities).

We have several times announced the principles which we think must apply here: Absent an insufficient fund (1) the statutory privilege of limiting liability is not in the nature of a forum non conveniens doctrine, and (2) the statute gives a shipowner, sued in several suits (even if in divers places) by divers persons, no advantage over other kinds of defendants in the same position. Concourse is to be granted 'only when * * * necessary in order to distribute an inadequate fund' (citing authorities). The 'purpose of limitation proceedings is not to prevent a multiplicity of suits but, in an equitable fashion, to provide a marshalling of assets—the distribution pro rata of an inadequate fund among claimants, none of whom can be paid in full' (citing authorities). We see nothing to the contrary in Maryland Casualty Co. v. Cushing, 347 U. S. 409, 74 S. Ct. 608, where the claims aggregated $600,000 and the Court was advised the valuation was but $25,000."

In *Petition of Trinidad Corp.* (*supra,* 427) the Court made its position even more clear:

"The appellant, in a powerful argument, has asked us to re-examine the *Texas Company* holding. It asserts that in a limitation proceeding involving multiple claims 'the heart of this system is a *concursus* of all claims to ensure the prompt and economical disposition of controversies in which there are often a multitude of claimants,' citing *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409. It stresses the pertinence of the following passage from the opinion in *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.,* 273 U. S. 207:

'The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader, and a

creditor's bill. It looks to a complete and just disposition of a many cornered controversy, and is applicable to proceedings *in rem* against the ship as well as to proceedings *in personam* against the owner, the limitation extending to the owner's property as well as to his person."

And appellant further cites *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527; *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *The Scotland*, 105 U. S. 24, 33; *Ex parte Slayton*, 105 U. S. 451, 452; and *Just* v. *Chambers*, 312 U. S. 383, 385-6. It suggests that this court in deciding the *Texas Company* case may have overlooked these decisions. But in none of those decisions was there a consideration of the question presently raised, i.e., whether when the fund in court is adequate for payment in full of all the claims, the courts should exercise its jurisdiction to effectuate and maintain a concourse.

It is, of course, true that in limitation cases in which the sum total of the damages as liquidated may exceed the fund available for the payment of claims, the concourse of all claimants in the limitation proceeding is a technique indispensable to the statutory objective, viz., a marshalling of claims. For in such a case, each claimant has an interest not only to enhance his own damages but also to hold t a minimum the damages allowed on competing claims: the greater the damages proved for a competing claim the less will be the proportionate share of the fund actually payable to another claimant under 46 U. S. C. A. 184. In that situation, it is a matter of indifference to the owner how one claimant fares, vis-a-vis another. This feature explains the description, in *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co., supra*, of such a proceeding as 'a many cornered controversy.' In such cases, on the issues of the owner's liability and of its right to a limitation, the claimants have a common interest based largely on the same facts: but on the issue of their respective damages their in-

terests are competing. The concourse is the statutory technique for the determination of these common and competing interests. In such cases, therefore, the concourse will not be disturbed—not even at the instance of the shipowner, as we held in *The Quarrington Court*, 102 F. 2d 916.

However, in cases in which the fund exceeds the total amount of damages which may be awarded, the 'many cornered controversy' does not exist. On the one hand, the owner's right to a limitation becomes moot and, on the other hand, no occasion for a marshalling arises and the concourse is not necessary to protect one claimant from excessive claims by competing claimants. In such cases, this court has held that the limitation statute carries no power to enforce a concourse, thereby depriving claimants of a choice of forum otherwise available. *The Acquitania*, 14 F. 2d 456, aff'd 20 F. 2d 457; *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.*, 159 F. 2d 273; and *Petition of Moran Transportation Corp.*, 185 F. 2d 386. The holding of *Petition of Texas Company* is no more than a logical development of that doctrine: it recognizes that, when application is made to relax a concourse previously granted, the court in the exercise of its discretionary powers must make a preliminary determination of the adequacy of the fund in court to pay in full all claims which may be allowed.

Generally, for purposes of such a determination the maximum damages originally sought on claims still pending will be taken as the measure of an adequate fund: the court will not look into the merits of the claims but will assume that the full damages sought may be awarded. But the *Texas Company Petition* rule recognizes that in the formulation of its discretion the court should give appropriate consideration to releases of claims theretofore filed and to the probability that additional claims may yet be filed. Nevertheless, the same case reaffirms our earlier holding that, in cases in which the fund is found adequate to obviate the need for marshalling, the limitation statute may not be taken

as a grant of power, not otherwise existing in the limitation court, to enjoin a multiplicity of actions. It follows that neither the existence nor the possibility of multiple actions growing out of the maritime disaster which gave rise to the limitation proceeding is relevant to a determination of the adequacy of the fund.

In line with our prior decisions we again hold that, on a finding of an adequate fund made in the light of all relevant factors, on an application seasonably made it is a proper exercise of discretion to grant leave to prosecute a claim outside the concourse and that it would constitute an abuse of discretion to deny such an application and thus deprive the claimant of his choice of forum."

It will be noted from both opinions of the Court of Appeals in *Petition of Texas Co.* and *Petition of Trinidad Corp.* (*supra*) that the numerous decisions cited by petitioner for general law propositions were thoroughly reviewed. The statements under Point I of petitioner's brief that neither the limitation statutes nor the rules require that the claims exceed the fund overlook the fact that the statutes were designed long ago to enable a ship owner to limit his liability to the value of his interest in the vessel. Title 46 U. S. C., Section 183 is sub-headed "Amount of liability" and provides that "the liability * * * shall not exceed * * * the value of the petitioner's interest in the vessel". Section 184 entitled "Apportionment of compensation" provides for the apportioning of the sum to which the owner may be liable among the claimants "whenever * * * the whole value of the vessel, and her freight for the voyage, is *not sufficient* to make compensation to each of them" (italics ours). Accordingly, "they shall receive compensation from the owner of the vessel in proportion to their respective losses".

The admiralty rules merely provide the procedural measures to be taken by an owner "who shall desire to claim the benefit of limitation of liability" (Rule 51). He

is permitted in the proceeding to contest his liability or that of his vessel. Rule 53.

But nowhere in either the statutes or the rules is there any language justifying petitioner's present contention that the *limitation* statute is primarily a *concursus* statute. Thus while petitioner states that neither the statute nor the rules require that the claims exceed the fund, its argument fails because conversely neither the statute nor the rules provide *for a concursus, absent an inadequate fund. Petition of Texas Co.*, 213 F. 2d 478, 481 (C. A. 2).

As the Court of Appeals pointed out in *Petition of Trinidad Corp.*, 229 F. 2d 423, 528 the many-cornered controversy arises only where there is an inadequate fund, requiring the marshalling of claims so that the competing claimants might receive just shares of the fund, the shipowner being indifferent to the result among them if liability and the right of limitation have been determined. The concourse is the statutory technique for dividing the fund. But where the fund exceeds the total amount of damages there is no many-cornered controversy to be settled among the claimants for the concourse is unnecessary to protect one claimant against the excessive claim of another. Therefore, the limitation statute carries no power to enforce a concourse where the fund is adequate, and thereby to deprive a claimant of a choice of forum otherwise available.

This Court is familiar with its decision in *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, upon which petitioner so strongly relies in claiming that a *concursus* is the primary purpose of the limitation statute. As the Court of Appeals pointed out in *Petition of Texas Co.* (*supra*) the claims in that case aggregated $600,000 and the Court was advised that the valuation was but $25,000. While it is true that Mr. Justice FRANKFURTER spoke of the heart of the "system" (i.e. the admiralty rules) as a *concursus* of all claims, that language, we believe, is further explained at page 417 where the Court wrote:

> "They (the admiralty rules) ensure that all claimants, not just a favored few, will come in on an equal footing to obtain a pro rata share of their damages."

At page 418 the Court pointed out that the claims totalled $600,000, the policies in suit only $180,000 and that it could asume that the salvaged ship finally would be valued at $25,000. The whole point of that case was that the Court realized that some claimants in direct action suits under insurance policies would exhaust the insurance fund designed to support the limitation fund, and thereby other claimants would be unjustly deprived of their fair proportionate shares.

Mr. Justice CLARK, in the course of his opinion, said that the Act of 1851 was to encourage American shipping "by placing a limitation upon the personal liability of the ship owner" where there was no privity or knowledge. Mr. Justice BLACK, at page 423 of his dissenting opinion, stated:

> "This Act relieves shipowners from a large part of the liability normally imposed on employers for torts of their employees."

He pointed out that the ship owner could simply turn a fund equal to the value of his interest over to the Court in a limitation proceeding and all claims against him would then have to be satisfied from that fund, no matter how large the claims or how small the fund.

Thus, though petitioner contends so strenuously that *concursus* is the dominating feature of the limitation statute, the very title of the Act and its language as well as that of the rules refutes its argument.

This Court said in *Langnes* v. *Green*, 282 U. S. 531, 541:

> "The term 'discretion' denotes the absence of a hard and fast rule. The Styria, Scopinich Claimant v. Morgan, 185 U. S. 1, 9, 22 S. Ct. 731, 46 L. Ed. 1027.

> When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result. In the case now under review, the problem presented to the District Court by the motion of respondent was quite simple. Upon the face of the record, the state court whose jurisdiction already had attached, was competent to afford relief to the petitioner (the claimant in the case). The difference in the effect of adopting one or the other of the two alternatives presented to the District Court was obvious. To retain the cause would be to preserve the right of the shipowner, but to destroy the right of the suitor in the state court to a common law remedy; to remit the cause to the state court would be to preserve the rights of both parties. The mere statement of these diverse results is sufficient to demonstrate the justice of the latter course; and we do not doubt that, in the exercise of a sound discretion, the District Court, following that course, should have granted respondent's motion to dissolve the restraining order so as to permit the cause to proceed in the state court, retaining, as a matter of precaution, the petition for a limitation of liability to be dealt with in the possible but (since it must be assumed that respondent's motion was not an idle gesture but was made with full appreciation of the state court's entire lack of admiralty jurisdiction) the unlikely event that the right of petitioner to a limited liability might be brought into question in the state court, or the case otherwise assume such form in that court as to bring it within the exclusive power of a court of admiralty. The failure to do this, in our opinion, constituted an abuse of discretion subject to the correcting power of the appellate court below and of this court."

Petitioner seeks to distinguish between a single claim case and one where, though there is an adequate fund, there are several claims. We submit that the Court of Appeals

correctly held in *Petition of Texas Co., Petition of Trinidad Corp.* and in this case that there is no peculiar reason for the admiralty court to have unlimited jurisdiction, the fund being adequate, to the prejudice of a claimant. There is the basic principle, as this Court recognized in *Langnes* v. *Green* (*supra,* 543) that the act which gives the Court its admiralty and maritime jurisdiction saves to suitors in all cases the right of the common law remedy where the common law is competent to give it, and good faith requires that this proviso shall have its full and fair effect.

Petitioner states, in reciting the early history of limitation proceedings that the statute should not be grudgingly construed against it. However, there is the equally forceful principle, wholly in line with this Court's holding in *Langnes* v. *Green,* that since the statute is in derogation of the common law and abridges the rights of a claimant to a full recovery of her damages, it is not to be construed to interfere with the rights of the claimant to a greater extent than is necessary to fully and adequately effectuate the purpose of the act. *Petition of Southern Steamship Company,* 132 F. Supp. 316, 319 (D. C. Del.).

Here, after having had the matter twice before him and with complete knowledge of all the circumstances, WEINFIELD, J. exercised his sound discretion and in a careful opinion concluded:

> "Since petitioner as shipowner is fully protected in the limitation of liability as to each vessel, there is no sound reason why claimant should not be permitted to proceed with her action in the State Court—the forum of her choice. Finally, the Court retains jurisdiction of the limitation proceeding in the event the petitioner's right to limit liability of each vessel should be questioned." Petition of Lake Tankers Corp., 137 F. Supp. 311, 313.

Summarizing, the respondent has not challenged but readily concedes the right of the ship owner to invoke the

limitation statute by the filing of its petition. It does not question those authorities in which, because the restraining order was not attacked, the admiralty courts have made a complete disposition of causes with varying results both to the ship owner and to claimants in those proceedings. But respondent insists that her common law right to a jury trial in the forum of her choice must receive the equal protection of the law as the right of the ship owner to limit his liability to the value of his interest in the vessel or vessels. Respondent strenuously opposes the argument that *concursus* is the primary object of the *limitation* statute. Dictum from after-trial decisions, cited by the petitioner, are not persuasive in the consideration of this primary, important question whether respondent's right to the common law remedy, where there is an adequate fund, may be taken away from her by the argument that the shipping industry in 1957 deserves better treatment than the railroads, airlines and other transportation concerns. Petitioner seeks to turn back the clock to that early day when American shipping needed encouragement, but it cannot be overlooked, as the Court of Appeals pointed out in *Petition of Texas Co.*, 213 F. 2d 479, 482 that absent an insufficient fund, the limitation statute gives a ship owner no advantage over other kinds of defendants, sued in several suits and by divers persons in divers places.

In *Maryland Cas Co.* v. *Cushing*, 347 U. S. 409, Mr. Justice BLACK in a dissenting opinion in which Chief Justice WARREN, Mr. Justice DOUGLAS and Mr. Justice MINTON concurred, wrote at page 437:

> "Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons."

We respectfully submit that this is no time for judicial expansion to the extent here claimed by petitioner,—that in the case of an adequate fund, it is entitled to a *concursus* of all claims though, as stated, the land and air transportation industries do not have that advantage.

At page 31 of its brief the petitioner states that it had an option to begin a single, or two proceedings and that it exercised that option and began one. It fails to mention its attempt to "get away" with filing one bond for only the tug. It further says, "That was the exercise of a clear right under the statute and the rules and such advantages as it may gain from the exercise of its right cannot justly be taken away."

Are there then *advantages* to be preserved *justly* to a petitioner to the detriment of a widow and three young children of a man who, it is charged, was lost to them by wrongful acts of the petitioner? Is this a sport of legal tricks by which the respondent's common law remedy may be wiped out at the sole "option" of the petitioner?

If petitioner succeeds in such argument the Court must hold that in any case where the limitation petition names two or more vessels, whose personnel are separately charged with fault, no relief whatever can be afforded to save to claimants-suitors their common law remedy. The Court would have to hold that it is powerless to lift the restraint though claims are separately asserted against separate adequate funds, and that the "option" or power lies solely with the petitioner by the manner in which it invokes the limitation statutes, either by one or two proceedings. That course would be wholly opposed to this Court's holding in *Langnes* v. *Green* (*supra*), from which we have quoted at some length at page 23 of this brief.

As to the "advantages" which petitioner seeks to gain, the Court of Appeals said, "The owner cannot enlarge its rights under the statute by the mere expedient of coupling

the two proceedings". *Petition of Lake Tankers Corp.*, 232 F. 2d 573, 577.

There is no question that petitioner could have filed a separate limitation proceeding for the barge after Judge RYAN's holding that a bond had to be posted for that vessel. In such event respondent would have filed a claim in that proceeding for $150,000 and another claim in the tug limitation proceeding for $100,000. Each fund would have been adequate and she, long ago, would have gotten permission to try her common law action.

It was petitioner who wrongly shaped the proceedings from the beginning by filing a bond only for the tug and, ever since, it has used all possible means to frustrate respondent in her legal remedy in the common law court, where her suit lies dormant against the time when the last efforts of petitioner will have been expended. We submit that the long hard fight which she has made against a formidable opponent deserves a prompt and decisive disposition in her favor.

III. The prosecution of respondent's state court action would not violate the admiralty jurisdiction of limitation but would determine only issues of negligence and damage, subject always to petitioner's limitation right in admiralty.

As a final maneuver against respondent, petitioner seeks to "overinflate a relatively simple proposition with apparent, but unreal, technical problems". *Maryland Cas. Co. v. Cushing*, 347 U. S. 409, 428.

It asserts that by some manner the state court will interfere with the *in rem* liability of the vessels, a subject concededly within the jurisdiction of the admiralty court. In this effort respondent states, at page 34 of its brief, that "The District Court thought that the Ulster County Jury could 'spell out the precise liability that may be imposed

with respect to each vessel' ". This is an erroneous presentation of the District Court's opinion. Within a few lines either side of the quoted portion there is clear language proving that the court had reference not to "each vessel" but to the *negligent operation* of each by its personnel. The Court said:

> "She will be entitled to the aggregate of her separate and reduced claims only if she succeeds in fastening liability by reason of the *negligent operation* of both the tug and the barge."

In speaking of the employment of a special verdict in the state court, upon appropriate application, the Court said:

> "Thus in the event, under a special verdict, there is a finding of *negligence in the operation* of the tug and not of the barge, the moving claimant's recovery, under her stipulation could not exceed the amount of her reduced claim."

Further on the Court said:

> "and alternatively if liability were established solely because of the *negligent operation* of the barge, no recourse could be had as against the bond posted by the tug" (137 F. Supp. 311, 312, 313).

It is clear, therefore, that it was never the District Court's intention to say that it would be within the province of the state court jury to determine the *in rem* liability of either vessel.

Petitioner had earlier cited cases in its brief, in aid of this *in rem* liability feature (pp. 5, 28), where a vessel without motive power in tow of a tug was exonerated from fault *in rem* because there was no active negligence on its part. This is sound law, as originally enunciated by this court in *Liverpool, etc. Nav. Co.* v. *Brooklyn Eastern District Terminal*, 251 U.S. 48, the principle being that since

the "dumb" vessel was not an instrumentality involved in the wrong it was not required to be surrendered in limitation proceedings. Here, however, the failure of proper lighting on the barge is a fault directly chargeable to her personnel, as well as to those on the tug. *Asfalto,* 45 F. 2d 857, 859 (D. C. S. D. N. Y.). In the first decision written in this matter, Judge RYAN said:

> "The collision here occurred at night. Movant claims that a contributing cause was improper lighting of the barge. The petition alleges that both vessels were exhibiting regulation navigation lights. A factual issue has been presented for trial. If the barge was not equipped with proper lights, as movant asserts, it cannot now be said that she was not an offending vessel merely because she was without motive power and under the control of the tug." *The Asfalto,* 45 F. 2d 857 (R. 22, not officially reported).

Respondent does not contest the *in rem* liability of petitioner's vessels by her state court proceeding. She readily agrees with the law propositions, at page 33 of its brief, that the admiralty court has exclusive jurisdiction of all questions affecting limitation and that the amount of the fund is exclusively for the admiralty court to administer.

We submit that the petitioner's suppositious problems with respect to the mechanics of handling this simple litigation unduly exaggerate the picture, especially since at this early stage we know that the fault of those in charge of each vessel, for the moment, is to be taken for granted on the question of limitation as that is really a defense of confession and avoidance. *Southern Pacific Co.* v. *U. S.,* 72 F. 2d 212, 214 (C. A. 2); *Petition of U. S.,* 178 F. 2d 243, 252 (C. A. 2).

There is no doubt that eventually petitioner may be held only for negligence of those in charge of one of its vessels and that the value of that particular vessel need

only be surrendered ultimately in admiralty when the appropriate limited judgment shall have been obtained by respondent, though not collected, in the state court. This would be the case even though the cause were tried in admiralty. However, neither this court nor the courts below are now called upon to fathom future questions of ultimate liability, either with respect to the navigation of the tug or the alleged improper lighting of the barge. Whether petitioner is in fact liable for the negligence of those in charge of either of its vessels, or both of them, and the quantum of such liability all are questions not yet ripe for consideration or until there is a trial in the state court and further proceedings on the petition to limit.

As pointed out by WEINFELD, J. a special verdict may be applied for which would spell out the precise liability with respect to each vessel and it is not to be presumed that the state court will deny an appropriate application for a special verdict. 137 F. Supp. 311, 313 (New York Civil Practice Act, Secs. 458, 459). Those sections make clear provision for instructions to the jury for a special verdict by questions and findings in writing, and which must be filed with the clerk and entered in the minutes, upon which the judgment is issued. The New York official reporters are replete with cases where those sections have been employed successfully and, in fact, the Appellate Courts have encouraged the practice for the very purpose of avoiding difficulty and lightening their work.

This case is a prime example of one where the special verdict would be of particular value and therefore, with all due respect to Judge HINCKS, who dissented from the majority opinion in the Court of Appeals, we cannot agree with his view that "It is by no means unlikely that the Judge would refuse a request to require special findings".

The special verdict would entail but three questions which may be briefly stated: (1) Was defendant's personnel

in charge of its tug negligent to plaintiff's damage? (2) Was defendant's personnel in charge of its barge negligent to plaintiff's damage? (3) The amount of damages sustained by plaintiff. The mechanics for the collection of her reduced claims thereafter would rest solely within the province of the admiralty court in the limitation proceeding.

The "safeguards" already provided for, in accordance with *Petition of Trinidad Corp.* and *Petition of Texas Co.* (*supra*), were further strengthened in petitioner's favor by the Court of Appeals in this case. In affirming the decision below it imposed the additional conditions that a permanent injunction will issue enjoining respondent from collecting the excess of $100,000 unless the judgment rests on a special verdict allocating the amount as between petitioner, as owner of the tug and the barge. If the judgment exceeds $100,000 and the jury finds petitioner liable solely as tug owner, she is enjoined from collecting any such excess, and if liable solely as barge owner, she is enjoined from collecting any amount in excess of $150,000 (*Petition of Lake Tankers Corp.*, 232 F. 2d 573, 577).

It will also be remembered that she is bound completely by her stipulations and partial releases, as well as by the previous court order to do no more than to proceed to judgment in the state court. She may not collect that judgment elsewhere than in the limitation proceeding and the court expressly reserves jurisdiction to reestablish a concourse and adjudicate petitioner's right of limitation in the event the funds should prove to be inadequate or the petitioner's right to limit is questioned in the state forum (R. 5-9, 62).

The three situations, posed as additional obstacles by petitioner at pages 35 and 36 of its brief may be readily answered. Certainly neither the respondent nor her counsel would dare to execute on the state court judgment

against petitioner's bank accounts since they are now clearly enjoined by court order, issued on formal sworn stipulations. Further, in no event could petitioner be called upon to pay respondent $118,000 if the tug personnel are found negligent since she has reduced her claim to $100,000 against petitioner as tug owner. Finally, the suggestion that the admiralty court might some day enter a decree of exoneration with a perpetual injunction against all claims, including respondent's, is too far fetched for serious discussion. The District Court undoubtedly would take cognizance of its own orders previously entered and would, at the proper time, issue a final decree dispositive of respondent's claim and all others.

Since the funds are adequate, justifying the modification of the restraining order, and petitioner does not have an advantage over other kinds of defendants sued in several suits in divers places by divers persons, why should it be in a different position than a railroad or airline confronted with negligence suits of injured persons in several forums? In such litigations the results might well be different both as to liability and damages. As *concursus* is not the petitioner's right under the circumstances of this case, the results with respect to liability in the state court or the admiralty court merely parallel those which other transportation industries must face, except that they do not enjoy the valuable privilege of limiting their liability. There is no question of the decisions in the state court being *res judicata* here. *Petition of Lake Tankers Corp.*, 232 F. 2d 573, 577.

Accordingly, it is submitted that respondent's right to a jury trial in the forum of her choice is of paramount importance and should be effectuated since all "safeguards" possible have been afforded petitioner in its right of limitation.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

Dated New York, N. Y., April 26th, 1957.

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Supreme Court of the United States

October Term, 1956

No. 445

LAKE TANKERS CORPORATION,
Petitioner,

against

LILLIAN M. HENN, Administratrix,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner presents its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

Statement of the Case

Petitioner's tug was push towing petitioner's barge up the Hudson River when the yacht BLACKSTONE, with eleven men on board, collided with the barge, capsized and sank. Ten men were rescued but the eleventh, respondent's decedent, has not been found. Suit was brought in the State Court against petitioner for $500,000 for the death. Petitioner began this limitation proceeding and eleven claims were filed which aggregate $259,500. Bond was filed for

the tug and her pending freight in the amount of $118,500 and, later, for the barge in the amount of $165,000. The death claimant, respondent in this Court, then allocated her claim $100,000 to the tug and $150,000 to the barge, the aggregate of all claims remaining at $259,500. Respondent then moved to relax the restraining order, and for leave to proceed with her State Court action. Weinfeld, *D. J.*, granted the motion, 137 F. Supp. 311. On appeal the Court of Appeals for the Second Circuit affirmed, two to one. R. 57; 232 F. 2d 573. Upon petition for rehearing *en banc* the full bench granted rehearing and affirmed four to two without opinion. R. 82; 235 F. 2d 783. On certiorari this Court affirmed, three justices dissenting and Mr. Justice Whittaker not participating. 353 U. S. — (1957), 25 U. S. L. Week 4431 (June 10, 1957).

Grounds for Rehearing

I. The facts require a reversal of the decisions below to conform the result to this Court's decision.

The premise upon which this Court's decision is based is that the fund is "indubitably" sufficient to pay all claims in full. This Court stated in its opinion:

> "This is not to say that *concursus* is not available where a vessel owner in good faith believes the fund inadequate, but here there is no contention that there might be further claims; the value of the vessels is undisputed and the claims are fixed; it follows indubitably that the fund is sufficient to pay all claims in full. While it is true the claims as initially filed in the state court exceeded the fund created in the limitation proceeding, still when the admiralty court dissolved the injunction against the state suit these claims, as filed in and limited by stipulation and order of the admiralty court in the limitation proceeding, aggregated less than the fund."

But the fund in this case has not been determined and there is no assurance that it will exceed the aggregate of

the claims. The bonds given by petitioner are merely security to protect the claimants by maintaining the *status quo* pending trial and determination of the fund. *Black Diamond Steamship Corp.* v. *Robert Stewart & Son Ltd.*, 336 U. S. 386, 398 (1949). The amount of the fund will not be known until, after trial, the Court has determined the *in rem* liability of the vessels because petitioner need put into the fund only the value of the vessel or vessels at fault. *Liverpool etc. Nav. Co.* v. *Brooklyn Eastern District Terminals*, 251 U. S. 48 (1919); *The Transfer No. 21*, 248 Fed. 459 (2d Cir. 1917); *Standard Dredging Co.* v. *Kristiansen*, 67 F. 2d 548 (2d Cir. 1933), *cert. den.* 290 U. S. 704; *Harbor Towing Corp.* v. *Atlantic Mutual Ins. Co.*, 189 F. 2d 409 (4th Cir. 1951).

If the tug alone is held at fault the fund will be $118,500—obviously inadequate. If barge alone is held, the fund will be $165,000—also obviously inadequate. Only if both are held at fault will the fund be adequate. Since the amount of the fund cannot be known until after trial the basic premise upon which this Court affirmed is lacking.

Since there are eleven claimants against a fund not indubitably known to be sufficient, petitioner is entitled to hold them in concourse for a binding determination among all as to the alleged *in rem* fault of tug and barge. This is consistent with sound policy just reaffirmed by this Court in *British Transport Commission* v. *United States*, 353 U. S. —, 25 U. S. Law Week 4426, 4429 (June 10, 1957), where this Court said:

> "Since all claims arose out of the same incident they should be determined in a single cause, thus effectuating an 'economy of trial litigation' so much desired in judicial administration."

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted, and that upon further consideration the judgment of the Court below be reversed and the restraining order reinstated.

Dated, New York, June 28, 1957.

EUGENE UNDERWOOD,
Counsel for Petitioner.

H. BARTON WILLIAMS,
of Counsel.

Certificate of Counsel

I, EUGENE UNDERWOOD, counsel for the above named petitioner do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

EUGENE UNDERWOOD,
Counsel for Petitioner.